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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

JOHN KEANE, Superintendent,
Sing Sing Correctional Facility,

Petitioner,

v.

OSCAR BORIA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in determining trial counsel to be constitutionally deficient for failing to convince respondent, who adamantly professed his innocence, to accept a plea offer it deemed beneficial, despite respondent's manifest inability to satisfy the prejudice requirement of the *Strickland v. Washington* ineffective assistance of counsel test.

2. Whether the Second Circuit's requirement that trial counsel must convince a client, who maintains his innocence, to plead guilty, and to enlist the client's family members' assistance in achieving that result, constitutes a new rule barred by *Teague v. Lane*, 489 U.S. 288 (1989), in this federal habeas corpus proceeding.

3. Whether the Second Circuit failed to apply properly the provisions of the "Anti-terrorism and Effective Death Penalty Act of 1996" which took effect April 24, 1996 and should have barred the habeas relief granted by the Second Circuit.

4. Whether the Second Circuit erred in granting a writ of habeas corpus when admittedly faced with "an Appellate Division finding of fact which has no present relevance" instead of remanding the case to the District Court for a hearing to clarify the extent of trial counsel's assistance.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, John Keane, Superintendent of the Sing Sing Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on May 3, 1996, directing the District Court to grant the petition for a writ of habeas corpus. The Petitioner is represented in this proceeding by the District Attorney of Orange County, New York.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 83 F.3d 48 (Oakes, J., Parker, J., and Knapp, J.) and is reprinted in the appendix of this petition at page App. 1, **infra**. The Order of the Court of Appeals for the Second Circuit denying rehearing or rehearing in banc is reported at 90 F.3d 36 and is reprinted in the appendix at page App. 42, **infra**.

The Memorandum Decision of the United States District Court for the Southern District of New York (Connor, J.) has not been reported. It is reprinted in the appendix at page App. 16, **infra**.

The Order of the New York Court of Appeals dismissing the appeal is reported at 83 N.Y.2d 1002 (1994), and appears in the appendix at page App. 29. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, is reported at 204

A.D.2d 652, 612 N.Y.S.2d 80 (2nd Dept. 1994), and may be found in the appendix at page App. 32. The Decision and Order of the Orange County Court (Byrne, J.) was not reported and is attached to the appendix at page App. 36.

JURISDICTION

The petition for a writ of habeas corpus was filed in the Southern District of New York, invoking federal jurisdiction under 28 U.S.C. §2254. On October 13, 1995, the Southern District denied the petition for a writ of habeas corpus. App. 16.

On May 3, 1996, the Second Circuit entered a judgment and an opinion reversing that decision and remanding the case to the district court with directions to grant the Petition and release the defendant without disturbing his judgment of conviction. App. 1.

On July 17, 1996, the Court of Appeals for the Second Circuit denied the State's Petition for rehearing and suggestion for rehearing in banc. App. 42.

This petition for certiorari is filed within ninety days of that date, and is therefore timely. Sup. Ct. R. 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the Constitution of the United States provide respectively, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.
>
> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 13, 1988, following a lengthy police investigation, Oscar Boria (hereinafter defendant) was arrested at his place of business, O.B.'s Towing, for selling two ounces of cocaine to a police informant. The police informant, possessing marked money and wearing an electronic transmitter which the police were monitoring, entered defendant's place of business. After a brief conversation, the informant purchased cocaine from defendant, left O.B.'s Towing, and delivered the cocaine to the police. The police then immediately entered O.B.'s Towing, retrieved the marked money from defendant's person, and arrested defendant.

State Court Proceedings

On May 24, 1988, Orange County Indictment #88-246 was filed, charging defendant with the class AII felony of Criminal Sale of a Controlled Substance in the Second Degree [New York Penal Law §220.39(1)]. At his arraignment on May 24, 1988, defendant, represented by Thomas Murphy, Esq., entered a not guilty plea. On June 10, 1988, defendant retained Gary Greenwald, Esq., to represent

him in this matter. At some point following defendant's arrest, the Orange County District Attorney's office offered defendant a plea to a class B felony with a recommended sentence of one to three years. The District Attorney's office further stated that, if the offer was rejected, a superseding indictment would immediately be filed charging defendant with a class AI felony. On August 10, 1988, Gary Greenwald, Esq., appeared in court on behalf of defendant and rejected the District Attorney's plea offer. Although defendant was not present in court when this plea was rejected, Mr. Greenwald advised the court that he had conferenced the matter with his client that morning.

On September 20, 1988, the superseding indictment was filed, charging defendant with the crime of Criminal Sale of a Controlled Substance in the First Degree [Penal Law §220.43]. Defendant was arraigned on the new indictment on September 26, 1988, entered a plea of not guilty, and the matter was adjourned for the submission of motions and conferences.

The case was eventually set for trial on October 12, 1989. Just before the trial, the District Attorney's office offered to let defendant plead guilty to the class AII felony of Criminal Sale of a Controlled Substance in the Second Degree, with a recommended sentence of three years to life. Defendant rejected that offer. The case thereafter proceeded to trial, and defendant was found guilty of Criminal Possession of a Controlled Substance in the First Degree. On January 4, 1989, defendant was sentenced to a term of state incarceration of twenty years to life.

On July 23, 1991, defendant, pursuant to New York State Criminal Procedure Law §440.10, filed a motion seeking a vacatur of his conviction on the grounds that he was denied the effective assistance of counsel. In his motion, defendant argued that his trial counsel, Gary Greenwald, Esq., failed to investigate his case properly prior to rejecting the People's plea offer, that Mr. Greenwald failed to advise him of the People's original plea offer, and that Mr. Greenwald failed to advise him to accept that plea offer.

On October 8, 1991, by Decision and Order of the County Court, a hearing was ordered to determine the factual issues raised in defendant's motion. During the hearing, the court focused specifically on whether defendant was advised of the District Attorney's original plea offer by his counsel, Gary Greenwald, Esq.

On July 14, 1992, the Honorable Thomas J. Byrne, County Court Judge, denied the defendant's motion and concluded that defendant had received the effective assistance of counsel and had been advised of the People's plea offers in a timely manner.

Defendant's appeal of the denial of the §440.10 motion was consolidated with his direct appeal before the New York State Supreme Court, Appellate Division, Second Department. In a Decision dated May 23, 1994, the Appellate Division upheld defendant's conviction and determined that there was sufficient credible evidence in the record to support the hearing court's finding that defendant was adequately represented and was made aware of the People's plea offers. The New York State

Court of Appeals denied defendant's application to appeal on July 22, 1994.

Federal Court Proceedings

On March 16, 1995, defendant filed a petition in United States District Court for the Southern District of New York for a writ of habeas corpus, claiming, *inter alia*, that attorney Gary Greenwald's representation of him was so inadequate as to violate his constitutional right to the effective assistance of counsel.

The District Court denied the petition for a writ of habeas corpus on October 6, 1995, holding that Greenwald's representation did not violate defendant's federal right to counsel because the state court's record clearly revealed that defendant had been informed of the People's plea offer in a timely fashion and because defendant's actions in maintaining his innocence through trial undercut defendant's claim that he would have accepted the plea offer had he known about it. Accordingly, the District Court held that defendant failed to satisfy the prejudice component of the *Strickland* test.

The United States Court of Appeals for the Second Circuit reversed and remanded the case to the District Court, directing that court to grant the writ. The Second Circuit held that Greenwald's representation violated defendant's federal right to counsel because Greenwald failed to recommend acceptance of what it deemed to be a beneficial plea offer, failed to take stronger steps to overcome defendant's resistence to accepting such a plea, and

failed to enlist the assistance of defendant's family members to obtain that result.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Second Circuit in this case has expanded the reach of federal habeas corpus to claims of ineffective assistance of counsel in two important respects. Each extension is unwarranted and barred in this habeas corpus proceeding as a new rule by *Teague v. Lane*, 489 U.S. 288 (1989). More importantly, each extension will require the federal courts to review vast numbers of challenges to state criminal convictions that would have been barred under previously settled principles of law. Moreover, each extension increases not only the number of claims cognizable on habeas corpus, but also the degree to which the federal courts must engage in detailed analysis of state law, second-guessing the judgment of state lawyers and state courts as to the content of state law.

First, the Second Circuit has created a new rule that counsel, in dealing with a client who adamantly professes his innocence, must nonetheless persist in recommending acceptance of a plea offer which counsel deems beneficial but which the client has already vowed to reject. In doing so, the Second Circuit misapplied the rule in *Strickland v. Washington* in granting habeas corpus relief to a petitioner who could not satisfy either prong of the *Strickland* test.

Second, the Second Circuit, in violation of the rule of *Teague v. Lane*, declared, as a result of a habeas petition, new rules of constitutional law defining how counsel must advise their clients. In particular, the Second Circuit would now require counsel to convince a client, who maintains his innocence, to plead guilty, and to enlist the client's family members' assistance in achieving that result.

In reaching its decision, the Second Circuit failed to apply properly the provisions of the "Anti-terrorism and Effective Death Penalty Act of 1996" which took effect April 24, 1996 and, as the Seventh Circuit has already held, restricted the scope of habeas relief to such an extent that it should not have been granted in this case.

Finally, the Second Circuit erred in granting a writ of habeas corpus when admittedly faced with "an Appellate Division finding of fact which has no present relevance" instead of remanding the case to the district court for a hearing to clarify the extent of trial counsel's assistance.

I. The Second Circuit improperly determined that defendant, who adamantly professed his innocence and insisted on proceeding to trial, nevertheless satisfied the prejudice component of the *Strickland v. Washington* test to show the ineffective assistance of counsel because counsel failed to convince defendant to accept a plea offer.

The Second Circuit held that defendant's trial counsel had been consitutionally ineffective for failing to

advise defendant, who had repeatedly and publicly proclaimed his innocence, to accept a proffered plea agreement that the Second Circuit deemed beneficial. (App. 10) In reaching this conclusion, the Second Circuit improperly failed to eliminate the distorting effects of hindsight, failed to evaluate counsel's conduct from counsel's perspective at the time, and almost totally disregarded the well-established rule that a defendant raising such a claim must establish prejudice arising from his counsel's allegedly defective representation.

In the seminal case of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), this Court held that a defendant claiming the ineffective assistance of counsel must show, first, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; *and*, second, counsel's performance prejudiced petitioner to the point that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064 (emphasis added).

It is well established that a reviewing court must indulge the presumption that the defendant's counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S.Ct. at 2066. Consequently, to prevail, defendant must identify acts or omissions of counsel that were not the result of reasonable professional judgment. Such a review, however, cannot take place in a vacuum, and counsel's acts or omissions must be considered in light of all the surrounding circumstances. *Id.* Just as importantly, defendant must show

that, but for counsel's deficient representation, the result would have been different. *Id.* at 694, 104 S.Ct. at 2068; *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S.Ct. 366, 371 (1985). In granting defendant's writ of habeas corpus, the Second Circuit improperly determined that defendant had satisfied both prongs of the *Strickland* test when, in fact, he had satisfied neither.

The Second Circuit determined that defendant's counsel was constitutionally deficient for failing to recommend acceptance of a plea offer it deemed to be beneficial. (App. 10) In reaching this conclusion, the Second Circuit failed to comprehend the totality of circumstances surrounding this case and improperly evaluated defendant's habeas claim through the distorting effects of hindsight, as specifically warned against in *Strickland*. At the plea negotiation stage, counsel's obligation is met by ensuring that his client had an understanding of the law in relation to the facts so that the accused could make an informed and conscious choice between accepting the prosecution's offer or rejecting it and proceeding to trial. *See, Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir. 1984); *Walker v. Caldwell*, 476 F.2d 213, 218 (5th Cir. 1973). Here, Greenwald was confronted with a client who steadfastly maintained (and apparently still does, as no affirmation to the contrary was ever submitted by defendant) his innocence. The record is clear that defendant had no interest in accepting any plea offer and rejected two separate offers prior to trial. (App. 22, 39-41) Indeed, Greenwald was retained in this case only because defendant disagreed with the advice of his former attorney, who wanted the defendant to plead guilty in exchange

for the one-to-three-year sentence. Under these circumstances, Greenwald, exercising customary skills and diligence, reasonably concluded that further discussion with defendant regarding the possibility of accepting a plea offer was futile and instead directed his energies to the area of trial preparation.

Recognizing that every case presents unique opportunities and challenges for plea bargaining, the Third Circuit has decided it "cannot state precisely what standard defense counsel must meet when advising their clients about the desirability of a plea bargain . . . " *United States v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992). The Second Circuit seems more confident of its ability to set standards. In support of its conclusion that Greenwald should have persisted in satisfying the formalistic requirement of recommending a plea offer defendant had already promised to reject, the Second Circuit relies on *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948), in which this Court stated, in dictum, that "counsel must, after making an independent examination of the facts, circumstances, pleadings and laws involved, offer his informed opinion as to what plea should be entered." However, the facts in *Von Moltke* and *United States v. Villar*, 416 F.Supp. 887 (S.D.N.Y. 1976), also relied upon by the Second Circuit, are clearly distinguishable from the facts of this case. In *Von Moltke*, the attorneys who approached the defendant specifically advised her that, although they had come at her husband's request, they would not represent her as counsel. Indeed, they warned her that they would not hold what she said in confidence and would disclose anything she told them to the government. *Von Moltke*, 332 U.S. at 714. Those attorneys refused to advise the

defendant of her options and never explained the implications of the charges pending against her, advised her as to any possible defenses, or informed her of the punishments permissible under the indictment. *Id.* at 714. In reviewing those facts, this Court held that the defendant was deprived of her Sixth Amendment right to effective counsel.

In *Villar,* counsel, admittedly ignorant of his client's age and the possibility that an early plea would have made his client eligible for treatment as a young adult offender, failed to explain to his client the benefit of an early plea. *Villar,* 416 F.Supp. at 888. As a result of counsel's deficiencies, the defendant in *Villar* was sentenced to incarceration rather than probation, lost the ability to have his conviction discharged upon successful completion of probation, and became subject to deportation.

In contrast, the district court in this case determined that Greenwald discussed the People's plea offer with defendant on numerous occasions during the summer of 1988. (App. 22-23) Despite these conversations, defendant repeatedly and publicly made clear his refusal to accept any plea offer and his desire to try his case before a jury. Under the totality of these circumstances, Greenwald's decision to not pursue the issue of a plea bargain further and instead concentrate on trial preparations was an exercise of reasonable professional judgment. It is clear that the Second Circuit, with the benefit of hindsight, disagreed with defendant's decision to reject the proffered plea offers and proceed to a trial which ultimately resulted in a sentence of twenty years to life. While the Second Circuit is correct that defendant was left in a far worse position after trial, it was incorrect in granting

habeas corpus relief for that reason. The ultimate decision of whether to plead guilt or innocence necessarily rests with the accused and not his counsel.[1] *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982). Here, the record supports the district court's determination that Greenwald fully discussed the People's plea offer with defendant (including the consequences of his rejection) and that it was defendant's knowing and informed decision to reject that offer and proceed to trial. In light of defendant's adamant refusal to consider any plea offer, Greenwald's assistance, under the totality of the circumstances, satisfied the objective standard of reasonableness required in *Strickland v. Washington*.

The Second Circuit also erred in determining that defendant satisfied the second prong of the *Strickland* test because there was no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Defendant repeatedly asserted that he was innocent

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[1] In support of its position that Greenwald should have taken stronger steps to overcome defendant's resistance to accepting a plea offer, the Second Circuit relies upon a trial manual promoted by the defense bar, Anthony G. Amsterdam's *Trial Manual 5 for the Defense of Criminal Cases* (1988), which states that " . . . persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a **not guilty plea would be destructive**." Section 201 at 339. In doing so, the Second Circuit glosses over the admonition contained in the same section which states that "the decision whether to plead guilty or contest a criminal charge . . . ordinarily the most important single decision in any criminal case . . . must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will."

and not interested in any plea offer. Moreover, defendant never alleged in a sworn affidavit that, but for his attorney's errors, he would have accepted a plea offer. The Second Circuit therefore incorrectly concluded that defendant was prejudiced by Greenwald's failure to nonetheless complete the empty ritual of recommending acceptance of the People's plea offer. *See, Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995) (Defendant made "no direct assertion that he would have pled guilty if his counsel had provided him with additional information concerning the risks of trial"); *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991) (defendant's after-the-fact assertion that he would have pled guilty, without more, is insufficient to establish prejudice where defendant was aware of plea offer and cannot provide evidence to show any desire to plead guilty prior to his conviction).

In dismissing defendant's burden under the second prong of *Strickland* as a "question [which] need not long detain [it]," the Second Circuit determined that, had Greenwald advised his two new clients (defendant and defendant's father, who procurred and paid Greenwald) of his professional judgment that it was almost impossible for a "buy and bust" defendant to obtain an acquittal in Orange County, there would have been a "reasonable probability" that defendant's father would have organized the family to persuade defendant not to pursue the "suicidal course" he seemed bent upon following. (App. 10) This probability, according to the Second Circuit, could have "matured . . . to a very strong likelihood" had Greenwald taken the trouble to learn of the "ruinous statements" defendant had made after his arrest. (App.

10-11) Thus, the Second Circuit concluded, defendant satisfied the second prong of the *Strickland* test and was entitled to habeas corpus relief.

In reaching that conclusion, the Second Circuit failed to understand this case's history and completely disregarded defendant's repeated public assertions that he was innocent, was aware of and was rejecting the People's offers, and wanted a trial. The record clearly reflects that, immediately after defendant had been indicted on the AII felony charge, he rejected, out of hand, an offer to plead guilty to a class B felony with a sentence recommendation of one to three years in state prison. After defendant was reindicted on an AI felony charge, a lengthy pretrial hearing was held to litigate the admissibility of the inculpatory statements which the Second Circuit mistakenly concluded Greenwald had never discussed with defendant. It was **after** the conclusion of this suppression hearing (which resulted in the suppression of a tape recording and other inculpatory statements made by the defendant) that the prosecution conveyed its second offer of a plea to the AII felony with a sentence recommendation of three years to life. Certainly, after sitting through the suppression hearing, defendant fully understood the nature of the evidence arrayed against him. However, as the trial court determined in the post-trial hearing, defendant, with full knowledge of the evidence to be presented against him at trial, including the "ruinous statements" focused on by the Second Circuit, knowingly rejected the prosecution's second offer and demanded a trial. Clearly, defendant was never interested in a plea bargain and has never overcome the presumptively correct state court determination of that fact by

clear and convincing evidence. Accordingly, the Second Circuit erred in concluding that defendant was able to satisfy the second prong of the *Strickland* test.

The Second Circuit now stands alone in granting habeas relief in a case where a defendant cannot show objective proof that he would ever have considered accepting a plea offer. *See,* for example, *Engelen v. United States,* 68 F.3d at 241; *Foster v. Delo,* 39 F.3d 873, 877 (8th Cir. 1994); *United States v. Day,* 969 F.2d at 43; *Toro v. Fairmon,* 940 F.2d 1065, 1068 (7th Cir. 1991); *cert. denied,* ___ U.S. ___, 112 S.Ct. 3038 (1992); *Diaz v. United States,* 930 F.2d 832, 835 (11th Cir. 1991); *Turner v. State of Tennessee,* 858 F.2d 1201, 1206 (6th Cir. 1988).

Moreover, a review of the record indicates that the Second Circuit's conclusion that defendant had no "reasonable chance of acquittal" is simply incorrect. (App. 12) The admissibility of the vast majority of the evidence against defendant depended on the validity of a warrantless search of the defendant's place of business and the cooperation and testimony of a confidential informant. The sheer weight of case law on these issues should have convinced the Second Circuit that the outcome of a trial in such a case was far from certain. Had Greenwald been more successful than he was at the pretrial hearing, no evidence would have been available to the prosecution to prove defendant's guilt. As it was, Greenwald achieved the suppression of significant amounts of inculpatory evidence. Moreover, it is well known that confidential informants, who are "working off" their own criminal charges by cooperating with authorities, present severe credibility problems for the prosecution and often become unavailable when needed for trial. In light of

these facts, the Second Circuit clearly underestimated the chances of defendant's acquittal. Indeed, the Second Circuit seems more confident of that eventuality in hindsight than the prosecution was at the time it conveyed its original plea offer. Had the prosecution considered a conviction a foregone conclusion, it would not have offered a plea to a felony two grades lower than the top count in the indictment with an almost negligible sentence recommendation of one to three years in prison. Clearly, immediately before trial, when Greenwald's actions were called into question by defendant, neither the prosecution nor defendant were as confident of defendant's ultimate conviction as the Second Circuit was when viewing the case with the benefit of hindsight. Under the circumstances, the Second Circuit should have affirmed the district court's conclusion that defendant was never receptive to a plea offer and therefore could not satisfy the second prong of the *Strickland* test.

II. The Second Circuit erred in declaring a new rule of law in a habeas corpus proceeding which would require trial counsel to convince a client who maintains his innocence to plead guilty, and to enlist the client's family members' assistance in achieving that result.

It is well settled that a federal court considering a habeas corpus petition may not, in deciding that petition, declare a new rule of constitutional law. *Teague v. Lane*, 489 U.S. 288 (1989). Indeed, in considering defendant's appeal, the Second Circuit admitted that:

> "There seems to be no Second Circuit decision dealing with the precise question of a criminal

> defense lawyer's duty when a defendant's best interests clearly require that a proffered plea bargain be accepted, but the defendant, professing innocence, refuses to consider the matter."

(App. 7-8)

That concession alone demonstrates that there is no clearly established rule of constitutional law in this area. Nevertheless, in an unwarranted leap of logic, the Second Circuit concluded that this "lack of specific decision undoubtedly arises from the circumstance that such duty is so well understood by lawyers practicing in this circuit that the question has never been litigated." (App. 8) With no case law from this Court or the Second Circuit to support its position that counsel must recommend acceptance of a guilty plea to a defendant who maintains his innocence, the Second Circuit based its holding on a trial manual promoted by the defense bar, a single passage in the Model Code of Professional Responsibility, a federal district court ruling, and dictum from this Court's decision in *Von Moltke v. Gillies*, 332 U.S. at 721.

Contrary to the Second Circuit's position, clearly established federal law provides that there is *no* duty to recommend a plea to a client who has professed to be innocent. Indeed, the Second Circuit itself previously held that "It is not necessary that the defendant have counsel who recommends that a plea bargain be pursued." *Brown v. Doe*, 2 F.3d 1236, 1246 (2nd Cir. 1993); *cert. denied*, ___ U.S. ___, 127 L.Ed.2d 403 (1994). In *Brown*, the defendant was accused of participating in the robbery of an armored truck. The robbery, which resulted in the killing of two police officers, had been committed on behalf of a revolutionary group. In his petition for habeas

corpus relief, the defendant claimed that his " 'revolutionary lawyers' " had "pursued a confrontational defense strategy", in order to further " 'radical political beliefs' a strategy that 'made the idea of a plea [bargain] for their client deeply repugnant to them.' " *Id.* at 1240. The Second Circuit held that "[h]aving selected confrontational counsel who found plea bargaining repugnant, Brown cannot claim that his lawyer was inadequate at that stage of the proceeding" for not doing so. *Id.*

This is precisely the fact pattern in *Boria*. Defendant hired Greenwald specifically because defendant disagreed with his first attorney's advice to plead guilty and accept a one-to-three-year sentence. Greenwald was hired to take the case to trial. Despite this, the Second Circuit allowed defendant to claim that the lawyer he hired specifically to take the case to trial was ineffective because he did not talk him out of doing so.

The Second Circuit's decision runs contrary to sound public policy. While it may be "the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement . . . " *Libretti v. United States*, 116 S.Ct. 356, 368 (1995) (dictum) (defendant's plea bargain, including an agreement to forfeit assets, was valid), the ultimate decision to accept or reject the plea must lie with the defendant himself. *See, Miller v. Angliker*, 848 F.2d 1312, 1322 (2nd Cir. 1988); *cert. denied*, 488 U.S. 890 (1988). Accordingly, an attorney's constitutional duty has always been limited to providing the defendant with the information relevant to make that decision, such as the terms of the proposed plea, the risks and consequences of accepting or rejecting it, the rights forfeited by pleading guilty and the options available if

the case proceeds to trial. The Constitution does not require, and this Court has never held, that counsel must actually recommend the plea or encourage the defendant to accept it.

Nor can such a requirement be inferred from existing law. Indeed, there is no reason for such a requirement, and every reason not to impose it. While the Second Circuit would require an attorney to persuade a defendant to accept a plea that "appears to be desirable," it ignores the fact that the same plea offer will "appear desirable" to some competent attorneys and not to others. Even if the plea would seem advantageous to every attorney, that determination would necessarily be based on a limited range of objective factors, including the strength of the case and the different sentence exposures before or after a trial. However, because a defendant may validly be motivated by a far broader range of subjective factors, the overall desirability of a plea is not objectively determinable, and may well "appear" different to the client than it will to the attorney. For example, in *Brown* (2 F.3d 1236, **supra**), cooperating with the government and pursuing a plea bargain may indeed have been "objectively" or "legally" advantageous to the defendant. However, the defendant valued his personal philosophy of "revolution" against the government more than obtaining the purported legal advantage of a lower sentence. An attorney simply cannot substitute his judgment for that of his client or disregard the values the client places above a shorter sentence.

An even greater departure from existing federal law was the Second Circuit's pronouncement that Greenwald

had "two new clients" in this case; defendant and defendant's father, who procurred and paid Greenwald. (App. 10) Such a view is erroneous and anthetical to the fundamental premise of the American criminal justice system which empowers an accused with the ultimate authority in determining his or her fate. Never before has it been suggested that an uncharged individual, merely by bearing the cost of a defense, should have equal authority in deciding whether a defendant should plead guilty or proceed to trial. Indeed, the Second Circuit fails to explain how Greenwald could have supplied defendant's father with enough information to enable him to convince his son to plead guilty without violating defendant's attorney-client privilege.

Clearly, the Second Circuit's proposed remedy is worse than the perceived problem. Indeed, defendants frequently claim their attorneys were ineffective because they recommended the plea *too* strongly or coerced it. Thus, the commonly expressed concern is that undue influence will be brought to bear on a defendant to take a plea. *See, Meachem v. Keane,* 899 F.Supp. 1130 (S.D.N.Y. 1995); *DeLeon v. United States,* 1993 WL 88216 (S.D.N.Y. March 24, 1993); *Jackson v. Riley,* 1993 WL 77247 (S.D.N.Y. March 12, 1993). And if, as the Second Circuit would require, family members aid counsel in pressuring a defendant to take a plea, this will undoubtedly give rise to more claims of coercion. *See, Wojtowicz v. United States,* 550 F.2d 786 (2nd Cir 1977); *cert. denied,* 431 U.S. 972 (1977); *Lunz v. Henderson,* 533 F.2d 1322, 1327 (2nd Cir. 1976); *cert. denied,* 429 U.S. 849 (1976).

The Second Circuit's decision announcing this new constitutional rule will have particularly negative and

adverse consequences on the validity and finality of state court convictions and the criminal justice system. The Second Circuit would create a vehicle for collateral attack on convictions after trial as well as those obtained by guilty pleas. At a minimum, the imposition of a requirement of affirmative persuasion to take a plea will generate an entirely new wave of post-conviction litigation, since attorneys will now operate in a narrow corridor of permissible interaction with their clients, subject to attack if they encourage a plea *and* if they fail to do so. The Second Circuit's decision will require judicial inquiry not only into the persuasion counsel has applied to obtain the defendant's acquiescence to a plea, but also into the validity of counsel's evaluation that the plea is desirable in the first instance. Such a result directly contravenes this Court's decision in *Strickland* which countenanced the granting of ineffective assistance claims only in the rarest of circumstances, and warned against the abuse of judicial scrutiny in this area with undue hindsight and the adverse results such scrutiny would have on the criminal justice system and the sanctity of the attorney-client relationship. *See, Strickland,* 466 U.S. at 690.

Just as this Court feared in *Strickland,* the Second Circuit's decision serves as an invitation to every prisoner who rejected a plea and was convicted after trial to seek to vacate the judgment, claiming that his attorney did not recommend the plea or did not do enough to encourage or persuade him to accept it. It will undoubtedly add to the ever-increasing numbers of ineffective assistance claims made by convicted petitioners seeking

another bite at the apple.[2] Indeed, the new rule is potentially more disruptive than the current claims of coercion. At least coercion claims may be answered by reference to the plea allocution, which normally demonstrates that the decision to plead guilty was not coerced. No such procedure is available to establish that defendant's rejection of a plea offer was made after receiving adequate advice of counsel. If the Second Circuit's rule is upheld and applied retroactively to state court convictions, this state will be without an adequate defense against wholesale reversal of state court convictions, and the courts and prosecutors will be forced to rely only on the hope that some defense attorneys did express their recommendations on the record in order to preserve the validity of state court convictions.

Even in cases arising in the future, the steps that would be necessary to avoid the dilemma proposed by the Second Circuit could have equally dire consequences. Some states may elect to join those that have discontinued plea bargaining, thus adding to the backlog of cases already crowding the criminal courts. Others may institute a new on-the-record colloquy, prior to the commencement of a trial, in which counsel would state (and the defendant might acknowledge) that he has advised

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[2] It should be noted that according to one study, during 1990 to 1992, ineffective assistance of counsel was alleged in 41% of the motions to vacate judgments of conviction in New York State Courts, and in 45% of the 1,626 federal habeas petitions in a sample taken from New York, Texas, California and Alabama. Victor E. Flango and Patricia McKenna, *Federal Habeas Review of State Court Convictions*, 31 Cal. W.L.Rev. 237, 248-250 (1995).

the defendant to accept a plea offer. The use of such a procedure, and the consequent interjection of the court into the attorney client relationship, will invaribly give rise to the claim that the defendant who changes his mind and later accepts the offer was judicially coerced or pressured to accept the plea. *See, United States v. Tateo,* 377 U.S. 463 (1964). Other defendants who steadfastly refuse to accept a plea may challenge their convictions on the grounds that their rejection of the plea prevented them from receiving a fair trial before the judge who oversaw the plea negotiation process. *See, United States v. Werker,* 535 F.2d 198, 201-202 (2nd Cir. 1976); *see, also, Brown v. Peyton,* 435 F.2d 1352 (4th Cir. 1970); *cert. denied,* 406 U.S. 931 (1972).

III. The Second Circuit failed to apply properly the provisions of the "Anti-terrorism and Effective Death Penalty Act of 1996" which, as the Seventh Circuit ruled, should have barred the granting of habeas relief.

On April 24, 1996, the President signed into law the "Anti-terrorism and Effective Death Penalty Act of 1996" (hereinafter, the "Act"). (P.L. 104-132) Title I of that Act alters the jurisdiction of the federal courts to entertain petitions for writs of habeas corpus, the circumstances under which a writ of habeas corpus may be granted, and the showing that must be made to set aside a state judgment of conviction. Under Title I, Section 104, of the Act, an application for a writ of habeas corpus

> . . . shall not be granted with respect to any claim that was adjudicated on the merits in state

> court proceedings unless the adjudication of the claim –
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

As outlined above, prior to the Second Circuit's decision in this case, there was no clearly established federal law requiring defense counsel to recommend acceptance of a plea offer or to pressure family members to overcome the will of a defendant who knowingly wanted to reject such an offer. Additionally, defendant failed to overcome his burden of showing that the district court's decision that defendant failed to satisfy either prong of the *Strickland* test was an unreasonable determination of the facts.

As no specific effective date was set forth in the Act, it became effective on April 24, 1996, when the President signed it into law. *Gardner v. The Collector,* 73 U.S. 499 (1868); *United States v. York,* 830 F.2d 885, 892 (8th Cir. 1987); *cert. denied,* 484 U.S. 1074 (1988). Because defendant's petition had not been decided prior to enactment of the Act, the Second Circuit should have evaluated defendant's claims in light of the habeas corpus restrictions contained in the Act. Accordingly, defendant's writ should have been denied, particularly since the changes in the law benefitted the state. *See, Lockhart v. Fretwell,* 113 S.Ct. 838, 844 (1993).

Under the provisions of the Act, which should have controlled the Second Circuit's decision, a writ is only available if a petitioner overcomes the burden of showing that the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Because defendant failed to overcome either of these burdens, the Second Circuit erred in granting the equitable remedy of habeas corpus relief.

A similar issue raised before the Seventh Circuit resulted in a contrary interpretation of the effect of the Act. *Lindh v. Murphy*, ___ F.3d ___, No. 95-3608 (Sep. 12, 1996). In *Lindh*, the Seventh Circuit, recognizing that the amendments to 28 U.S.C. §2254(d) were designed to curtail collateral review and augment the finality of judgments, determined that the Act should apply to existing judgments currently under collateral attack. Respectfully disagreeing with the "contrary conclusions" of *Edens v. Hannigan*, 87 F.3d 1109, 1111 n. 1 (10th Cir. 1996), and *Boria v. Keane*, 90 F.3d 36 (2nd Cir. 1996), the Seventh Circuit held that proper application of the Act precluded the issuance of a writ because *Lindh* was unable to meet either of the two burdens placed upon a petitioner by the Act.

IV. The Second Circuit erred in granting a writ of habeas corpus when admittedly faced with "an Appellate Division finding of fact which has no present relevance" instead of remanding the case to the district court for a hearing to clarify the extent of trial counsel's assistance.

Finally, the Second Circuit erred in reversing the district court's determination on an insufficient record. In its opinion, the Second Circuit conceded that "no state court ever gave solo consideration to the narrow question addressed in this petition." (App. 12) (Whether or not Greenwald advised Boria to accept the plea). The Second Circuit recognized that defendant had raised "all manner of real and imagined grievances" including the (disproven) claim that he had not been informed of the offered plea bargain until the superseding indictment had been returned. While the Second Circuit criticized the state court for failing to mention "petitioner's constitutional right to be advised whether the offered bargain 'appeared to be desirable' " and determined that the findings of fact made by the state court had "no present relevance" to the issue raised in defendant's petition, the Second Circuit nevertheless granted defendant's writ. (App. 12-14) In light of the acknowledged inadequate record, the Second Circuit erred in issuing its decision without first remanding the matter to the district court for a hearing to amplify the record on the issue of whether defendant was advised that the offered bargain appeared to be desirable.

Clearly, the state court had never been asked to address the issue of whether Greenwald should have recommended acceptance of the People's plea offer. At

the time, defendant based his claims for relief on the argument that Greenwald had never even conveyed the People's offers to him, a claim which has never been accepted by any court. Because the state is entitled to an opportunity to cure any deficiency of the factual showing on the record below by furnishing further evidence at an evidentiary hearing before the federal courts, the Second Circuit should have remanded the case to the district court for further clarification of this issue. *United States ex rel. Molloy v. Follette*, 391 F.2d 231, 232 (2nd Cir. 1968); *cert. denied*, 391 U.S. 917 (1968). Indeed, "the public interest requires that opportunity be given to present evidence which might show that the petitioner suffered no constitutional deprivation." *Willett v. Georgia*, 608 F.2d 538, 541 (5th Cir. 1979), quoting *United States ex rel. McNair v. New Jersey*, 492 F.2d 1307 (3rd Cir. 1974). This is particularly true where, as here, the writ of habeas corpus is not an appellate proceeding in a criminal prosecution, but a new and original suit brought by a criminal defendant in a federal court to enforce a civil right against the state. *See, Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J. dissenting); *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883).

In this case, it was particularly inappropriate to decide the case without a hearing, because it could not be found, on this record, that defendant was not advised to accept the plea. Rather, facts in the record supported the conclusion that he had been, at least by his first attorney. Indeed, defendant had hired Greenwald only because he disagreed with his first attorney's recommendation to plead guilty. Under these circumstances, the Second Circuit should have remanded the case to the district court

in order to afford the state court "an opportunity to introduce evidence upholding the validity of its action." *United States ex rel. Gorham v. Franzen*, 675 F.2d 932, 937 (7th Cir. 1982); *see, also, Camarillo v. Estelle*, 670 F.2d 473, 474 (5th Cir. 1981); *Walker v. Wilmont*, 603 F.2d 1038, 1041-1042 (2nd Cir. 1979); *Aston v. Warden, Powhatan Correctional Center*, 574 F.2d 1169 (4th Cir. 1978). After all, "the duty to try the facts anew exists in every case with which the state court has not after a full hearing reliably found the relevant facts." *Townsend v. Sain*, 372 U.S. 293, 317-18, 83 S.Ct. 745 (1963).

CONCLUSION

For the foregoing reasons, a petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1332 – August Term, 1995

(Argued March 29, 1996 Decided May 3, 1996)

Docket No. 95-2688

OSCAR BORIA,

Petitioner-Appellant,

-v.-

JOHN KEANE, Superintendent,
Sing Sing Correctional Facility,

Respondent-Appellee.

Before:

OAKES and PARKER, *Circuit Judges,*
and KNAPP, *Senior District Judge.**

Appeal from order entered in the United States District Court for the Southern District of New York (Conner, *J.*) denying a petition for a writ of habeas corpus.

Vacated and remanded.

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* Honorable Whitman Knapp of the United States District Court for the Southern District of New York, sitting by designation.

ROBERT N. ISSEKS, Middletown, NY,
for petitioner-appellant.

FRANCIS D. PHILLIPS, II, Goshen, NY,
for respondent-appellee.

WHITMAN KNAPP, *Senior District Judge:*

The petitioner is now – and for about six years has been – serving a twenty year to life sentence resulting from a "buy and bust" arrest for having sold four plastic bags of cocaine to an informer. This was petitioner's first contact with the criminal law. Upon this appeal, he does not challenge the propriety of the trial leading to his conviction. Rather, he asserts that he was deprived of constitutionally adequate representation by counsel when the People offered him a plea bargain which would have resulted in a one to three year sentence, and his attorney allowed him to reject such offer without giving him any advice as to the wisdom of so doing.

This argument was first presented to and rejected by the judge who had presided over the trial. The trial judge's rejection was affirmed by the Appellate Division of the New York Supreme Court, and leave to appeal to the Court of Appeals was denied. Petitioner renewed the claim in the instant Habeas Corpus proceeding, where it was rejected by the District Court in a carefully considered opinion. This appeal followed.

BACKGROUND[1]

Petitioner was arrested on May 13, 1988, and eleven days later was indicted for a Class A-II felony. Upon arraignment, being represented by one Thomas Murphy, Esq., he pleaded not guilty. On June 10, petitioner's father retained Gary Greenwald, Esq. to represent his son, making an "up front" payment of $8,000.[2] Some time between July 25 and August 10, the District Attorney advised Greenwald that the People were willing to accept a plea of guilty under circumstances which would result in a sentence of 1 to 3 years; but warned that should such offer be rejected, there would be filed a superseding indictment for a Class A-I felony which, pursuant to the "Rockefeller Laws," would make that or any similar plea impossible.

On August 10, Greenwald advised the court that the petitioner rejected the offer. The District Attorney then put on the record the warning he had previously given Greenwald about the consequences of rejection; and on the following day sent Greenwald a formal notice that the

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[1] As any trier of fact would have a tendency to discount (or even reject) the testimony of a defendant, this statement will be based exclusively on matters of record and the testimony of the attorney claimed to have rendered constitutionally ineffective representation.

[2] The formal retainer agreement executed by petitioner on or about June 10 provided: "I . . . do hereby agree to retain the law office of Greenwald, Graubard & Cohen on the matter pending before Goshen County Court. The legal fees exclusive of hearings and trials shall be a minimum of $10,000 and a maximum of $20,000. The retainer does not apply to any form of appeals." (H.36-37).

matter was to be presented to a Grand Jury. The threatened indictment was not returned until September 20, 1988. Petitioner was ultimately convicted, and on January 4, 1990, began to serve his sentence.

In 1992, petitioner, represented by a different attorney, moved the trial judge for an order vacating the judgment of conviction on the ground, among others, of constitutionally inadequate representation by counsel. A hearing on such motion, among others, began on February 26 and concluded on March 6.

Greenwald testified at great length at the hearing. He testified that he did not recall any conversation with the District Attorney or anyone in the District Attorney's office regarding the case before August 10. Nothing in his testimony suggests that he had any contact with the District Attorney's office between August 10 and September 20. Indeed, he testified that he could not recall with certainty the name of any assistant district attorney with whom he might at any time have spoken regarding this case. He had at all times exclusively relied on the petitioner for any and all information about the case.

Just before the trial began, Greenwald sought a ruling suppressing two ruinous statements petitioner had made after his arrest. He told the trial judge:

> had the attorney for the Defendant been aware of the existence of and the prosecutor's intent to use those statements for any purpose whatsoever [*see* footnote 3], during the course of trial then his advise to the Defendant, relative to

> accepting or to rejecting the proffered offer of a plea to a B felony, may well have been different.

Greenwald Affirmation, 9/25/89.[3]

However, time and again, and in many forms, Greenwald made clear that he had not in any way or at any time discussed with the petitioner the advisability of accepting or rejecting the offered plea. He testified that, after advising petitioner that a rejection of the plea would be final in the sense that the expected superseding indictment would eliminate all possibility of a minimal sentence, he kept discussing with petitioner strategies he planned to follow in defending against the new indictment.

His testimony made clear that, although he never even suggested such a thought to petitioner, it was his own view that his client's decision to reject the plea bargain was suicidal.[4] He sought to justify his conduct by

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[3] New York Criminal Procedure Law provides that upon demand of a defendant, the prosecutor has a duty to disclose "any written, recorded or oral statement of the defendant . . . made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him." N.Y. Crim. Proc. Law § 240.20(1)(a) (McKinney 1993). Greenwald swore in his affidavit of September 25, 1989, offered in support of his motion to suppress the statements, that "the prosecutor had . . . [falsely] informed the Defendant and this Court, that no such statements existed."

[4] For example, at the hearing, Greenwald testified: "on June 10th, 1988 [the day Greenwald was retained], it would have been my position and my belief that relative to criminal cases that a drug case under circumstances of a possession or direct sale to an undercover agent is probably one of the most difficult

asserting that he was certain that the petitioner would never admit his guilt or accept a plea. He said he had been confirmed in this certainty by the petitioner's repeated assertion that accepting a plea would embarrass him in front of his children. For example, Greenwald testified: "He would be very upset about the plea. He was upset about how he was embarrassed in front of his children. And he would bring up the subject in a context often about his upset about his children." (H. at 18).

Greenwald admitted that he had been aware that his client – like any other person – was capable of changing his mind.[5] Yet he did nothing to persuade either his client or the father by whom he had been retained of the

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cases to defend and, secondly, sir, in relationship to the hate, *which I often tell drug defendants,* that most people who sit on the jury have never seen drugs before such as cocaine . . . and [the jurors] generally are very prejudicial because peoples' views are very anti-drugs and, therefore, it is difficult and it's often difficult to get an unbiased jury in that regard." H. at 44 (emphasis supplied). He also testified that he had told the judge at sentencing that the court could "take judicial notice" that getting an acquittal in a drug case in upstate New York was almost impossible. *Id.*

[5] Greenwald's testimony in this regard was:

> Q (by petitioner's counsel) Mr. Greenwald, you knew from Day One, as you tell us, that he wasn't going to plead to anything; correct?
>
> A To answer your question, sir, what I knew from the beginning and having practiced criminal law for substantial years, often a client changes his position in regard to a matter, and though he did express what I have said, it is very possible at any given time he would change his mind for whatever reason. So the answer to your question is I did not know definitely.

absurdity of a decision to risk years of prison separation from his family to avoid a few hours of embarrassment "in front of his children."

DISCUSSION

Several questions are presented by the foregoing facts:

1. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (hereinafter *"Strickland"*), do the facts establish that Greenwald's conduct did indeed fall short of constitutionally required assistance?

2. Also under *Strickland*, can it be said that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"?

3. What is the impact upon this case of *Strickland*'s "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance?"

4. Are we precluded from considering these questions by any factual finding that may have been made by a New York State court?

We shall consider each of these questions in turn.

First, to show *Strickland* ineffectiveness it must appear that, under the totality of circumstances, Greenwald failed to exercise the skills and *diligence* that a reasonably competent attorney would provide under similar circumstances. 466 U.S. at 688. There seems to be no Second Circuit decision dealing with the precise question

of a criminal defense lawyer's duty when a defendant's best interests clearly require that a proffered plea bargain be accepted, but the defendant, professing innocence, refuses to consider the matter. This lack of specific decision undoubtedly arises from the circumstance that such duty is so well understood by lawyers practicing in this Circuit that the question has never been litigated.

While the Second Circuit may not have spoken, the *Strickland* Court has indicated how the question should be resolved. Just before starting its discussion of the merits, it observed that it had "granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." 466 U.S. at 684. Later it pointed to "[p]revailing norms of practice as reflected in American Bar Association standards" as guides "to determining what is reasonable." *Id.* at 688.

The American Bar Association's standard on the precise question before us is simply stated in its Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992):

> A defense lawyer in a criminal case has the duty to advise his client fully on *whether a particular plea to a charge appears to be desirable.* (emphasis added)

Anthony G. Amsterdam, in *Trial Manual 5 for the Defense of Criminal Cases* (1988), discusses the question in more detail:

> The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will. [citation omitted] But counsel may and *must* give the client *the benefit of counsel's professional advice on this crucial decision;* and often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty *in a case in which a not guilty plea would be destructive.* § 201 at 339 (the word "must" was emphasized by the author; otherwise, the emphasis is supplied by us)

This manual is a joint project of the American College of Trial Lawyers, the National Defender Project of the National Legal Aid and Defender Association, and the ALI-ABA Committee on Continuing Professional Education. The Reporter, Anthony G. Amsterdam, is a distinguished Professor of Law and Director of Clinical Programs and Trial Advocacy at New York University School of Law.

And finally, in *United States v. Villar,* 416 F.Supp. 887, 889 (S.D.N.Y. 1976), Judge Motley – in circumstances quite different from those at bar – made the following observation about effective assistance of counsel:

> Effective assistance of counsel includes counsel's informed opinion as to what pleas should be entered. *Walker v. Caldwell,* 476 F.2d 213, 224

(5th Cir. 1973); *Jones v. Cunningham*, 313 F.2d 347 (4th Cir. 1963), *cert denied* 375 U.S. 832, 84 S. Ct. 42, 11 L.Ed.2d 63 (1965). As Chief Judge Sobeloff stated in the latter case (at 353):

> Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist. *Such a duty is imposed for the salutary reason that 'prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.' von Moltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948). (emphasis Judge Motley's)

Turning to the facts before us, it would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice.

The second Strickland question need not long detain us. Had Greenwald – as he "often [told] drug defendants" – advised his two new clients (petitioner's father, who procured and paid him and petitioner, who signed the retainer agreement) of his professional judgment that it was almost impossible for a "buy and bust" defendant to obtain an acquittal in Orange County (*see* footnote 4, *supra*), there would have been more than a "reasonable probability" that the father would have organized the family to persuade petitioner not to pursue the suicidal course he seemed bent upon following. Indeed, had

Greenwald taken the trouble to learn of the ruinous statements petitioner had made after his arrest,[6] the probability of persuading him to accept the plea bargain would have matured from a "reasonable probability" to a very strong likelihood.

With respect to the *Strickland* "strong presumption," the District Judge in explaining his order under appeal gave it serious consideration. He emphasized Greenwald's testimony that he "had frequently discussed the plea offer with [petitioner] during the summer of 1988." This emphasis suggests that the District Judge considered the "strong presumption" as requiring a finding that Greenwald – in the course of these frequent discussions – must have, by implication at least, conveyed to his client his own belief that rejecting the offered plea bargain would be suicidal. However, Greenwald's unequivocal testimony prohibits such a finding. Such testimony did not give much indication of what occurred during these frequent discussions except that Greenwald seems to have kept explaining his planned strategies for winning an acquittal. However, it established beyond peradventure that Greenwald never gave his client any advice or suggestion as to how to deal with the People's offered plea bargain.

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[6] As noted in footnote 3, *supra*, Greenwald's affidavit in support of his motion to suppress these statements asserts that he had made appropriate demand on the District Attorney but that the latter had deceitfully denied the existence of any such statements. We find – especially in light of Greenwald's testimony about his contacts with the District Attorney's office (see p. 4 *supra*) – that such assertion is sufficiently improbable to warrant rejection as a matter of law. We do so reject it.

More importantly, the *Strickland* Court did not intend its "strong presumption" to apply to a case such as this. It made clear that the purpose of the presumption was to protect lawyers from having strategic decisions judged with "the distorting effects of hindsight." 466 U.S. at 689.[7] Greenwald was confronted with no strategic decision as to whether or not to give advice to his client. Had there been a reasonable chance of acquittal, petitioner might have been confronted with the strategic decision of whether or not to accept the plea bargain. In no event could Greenwald have been relieved of his constitutional duty to give his "professional advice on this crucial decision."

The fourth question, whether relief is precluded by any state court finding of fact, requires consideration of several circumstances heretofore irrelevant to this opinion.

No state court ever gave solo consideration to the narrow question addressed in this opinion. On the contrary, the above noted hearing before the trial court, which began on February 26 and concluded on March 6, dealt with an "omnibus" motion presenting an apparently wide variety of claims. Petitioner himself testified, claiming – in a manner typical of distraught defendants –

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[7] The *Strickland* Court was dealing with a capital case in which it was contended that the defendant's lawyer should have – in the sentencing phase of the case – provided the trial judge with concededly helpful character-type evidence. The lawyer's strategic reason for withholding such evidence was fear that – in light of expected cross-examination and rebuttal – it would do more harm than good.

all manner of real and imagined grievances. Among other things, he claimed that he had not been informed of the offered plea bargain until after the superseding indictment had been returned. That claim could be – and was – easily refuted by testimony of several witnesses whose credibility could not be questioned. The District Attorney, apparently treating the omnibus motion as a unit, made an attack on petitioner's credibility, focusing on this particular falsehood. The question of petitioner's reliability might well have been vital to many – if not most – of the questions presented by the omnibus motion. However, it has no bearing on the narrow question with which we are now concerned. *See* Footnote 1, *supra.*

When it came to decision, the trial judge was primarily concerned with a question of no present relevance, namely whether petitioner's statement as to the timing of his knowledge of the possibility of a plea bargain was truthful or false. His opinion does not mention petitioner's constitutional right to be advised whether or not the offered bargain "appear[ed] to be desirable." Similarly, the Appellate Division's affirming opinion addressed a host of issues not here relevant. Its sole finding of fact concerning the claimed inadequacy of counsel was that "[the petitioner] was made aware of a plea offer of 1 to 3 years imprisonment, and told his trial counsel to reject it." *People v. Boria,* 612 N.Y.S.2d 80, 81, 204 A.D.2d 652 (2d Dept. 1994).[8]

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[8] Leave to appeal to the Court of Appeals was denied by Honorable George Bundy Smith. 83 N.Y.2d 1002, 640 N.E.2d 151, 616 N.Y.S.2d 483 (1994). The Court itself was in no way involved, leaving the Appellate Division as the highest New

Turning to the question of whether we are precluded, we are faced with an Appellate Division finding of fact which has no present relevance, coupled with a conclusion of law that petitioner had been adequately represented by counsel. The District Attorney notes in his brief, at p. 8, citing *Strickland*, 466 U.S. at 698 and *Winkler v. Keane*, 7 F.3d 304, 308 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1407 (1994), that questions of law require *de novo* review. As we have seen, such review can lead to only one conclusion.

This leaves the question of what remedy should result from our ruling. In denying petitioner's motion to vacate the judgment, the trial judge suggested that the remedy petitioner sought, namely to be put back in a position of being able to plead to the lesser indictment, was procedurally impossible. Whether or not such relief would then have been possible, it would not now be appropriate. There could now be no assurance that witnesses necessary for prosecution would be available should a trial be required. Furthermore, there is no claim before us on this appeal that the trial was affected by constitutional (or indeed any) error. Accordingly, petitioner having already served six years in prison – at least twice as long as would have been possible had he accepted the offered plea bargain – we shall order that the sentence be reduced to time served and that the petitioner be discharged, but the judgment of conviction will not be disturbed.

York court to have ruled on the matter before us. See N.Y. Crim. Proc. Law § 460.20 (McKinney 1994).

CONCLUSION

For the above stated reasons, we vacate the order appealed from, and remand to the District Court for entry of an order granting the petition and directing that the petitioner be discharged.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OSCAR BORIA, Petitioner, - against - JOHN KEANE, Superintendent, Sing Sing Correctional Facility, Respondent.	95 Civ. 2248 (WCC) **OPINION AND ORDER**

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CONNER, D.J.:

Oscar Boria, who is currently incarcerated in Sing Sing Correctional Facility, has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Upon examination of his petition, we directed the government to respond. *See* Rule 4, Federal Rules Governing Section 2254 Cases. Based on our review of both parties' submissions, the petition is denied.

BACKGROUND

On May 13, 1988, petitioner was arrested inside the garage at O.B.'s Towing, his place of business, during a "buy-bust" operation conducted by the state police and a police informant, Jeff Cannella. The arresting officers did not have a warrant. The officers recovered from petitioner's shirt pocket $2,000.00 in marked money that the police had given to Cannella to make the buy. On May 24, 1988, petitioner was indicted on one count of criminal sale of a controlled substance in the second degree, a Class A-II felony, for selling two ounces of cocaine to Cannella. Petitioner, represented by counsel, pled not guilty at his arraignment. Petitioner subsequently retained Gary Greenwald, Esq., to represent him. Greenwald was petitioner's counsel from June 10, 1988, through sentencing.

At some point after the indictment was returned, the District Attorney offered to permit petitioner to plead guilty to a Class B felony, with a sentence recommendation of one to three years in prison. The District Attorney advised Greenwald that if petitioner did not accept the plea offer, the District Attorney would seek a superseding

indictment charging petitioner with a Class A-I felony. On August 10, 1988, Greenwald appeared in court and rejected the plea offer on his client's behalf. The grand jury returned a superseding indictment on September 20, 1988, charging petitioner with one count of criminal sale of a controlled substance in the first degree. On January 4, 1990, following a jury trial, petitioner was convicted and sentenced to a term of twenty years to life.

Petitioner then moved under New York State Criminal Procedure Law § 440.10 to vacate the judgment of conviction on the ground of ineffective assistance of counsel. After a hearing, the Orange County Court issued a Decision and Order denying petitioner's motion on July 14, 1992. The Appellate Division, Second Department, granted leave to appeal that decision, and consolidated the appeal with the direct appeal of petitioner's conviction. In a Decision and Order dated May 23, 1994, the Appellate Division affirmed both the conviction and the denial of the motion to vacate. The New York Court of Appeals denied leave to appeal on July 22, 1994.

Petitioner filed this application for a writ of habeas corpus on April 5, 1995. The petition requests relief on three grounds: ineffective assistance of counsel, admission at trial of evidence that was seized in violation of the Fourth Amendment, and insufficiency of the evidence to prove petitioner's guilt beyond a reasonable doubt.

DISCUSSION

A. Ineffective Assistance of Counsel

The Sixth Amendment guarantees to criminal defendants the "assistance of counsel" for their defense. *See*

U.S. Const., amend. VI. The Supreme Court has held that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). The Supreme Court has articulated a two-prong test for determining whether a criminal defendant received effective representation.[1] First, the attorney's performance must be " 'within the range of competence demanded of attorneys in criminal cases.' " *Strickland*, 466 U.S. at 687 (internal citation omitted). To avoid the temptations of hindsight, the reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. Second, if the attorney's performance was deficient, that deficiency must have prejudiced the defendant by creating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. The defendant must satisfy both prongs of this standard. Therefore, if petitioner makes an insufficient showing on one component of the inquiry, we need not address the other. *See id.*, at 697.

Petitioner contends that he was deprived of effective assistance of counsel because Greenwald did not advise him to accept the plea offer and because Greenwald conducted no independent investigation of the case to enable

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[1] This standard applies to ineffective assistance claims arising out of the plea process, as well as out of counsel's conduct at trial or sentencing. *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *Brown v. Doe*, 2 F.3d 1236, 1246 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1088 (1994).

him to evaluate properly whether his client should accept the plea offer. Petitioner maintains that Greenwald instead counseled him that he had a strong argument that the seizure of the marked money violated the Fourth Amendment and therefore a good chance of prevailing on a motion to suppress. Petitioner asserts that if Greenwald had advised him that he had a real chance of being found guilty, he would have accepted the plea offer. Greenwald contends that he discussed the plea offer with petitioner on several occasions and that petitioner was uninterested in pleading guilty because he steadfastly maintained his innocence and wanted his day in court.

In evaluating petitioner's contentions, we recognize that we do not begin our inquiry with a clean slate. Under 28 U.S.C. § 2254(d), "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction [and] evidenced by a written finding . . . shall be presumed to be correct. . . . " To overcome this presumption, petitioner must provide "convincing evidence that the factual determination by the State court was erroneous." *Id.* In the alternative, upon review of the relevant portion of the record from the state court proceedings, the District Court may determine that the factual determination is not fairly supported by the record. *See* 28 U.S.C. § 2254(d)(8). The "high measure of deference" accorded to the state court's findings applies only to underlying issues of fact. *See Sumner v. Mata*, 455 U.S. 591, 597-98 (1982); *Ventura v. Meachum*, 957 F.2d 1048, 1055 (2d Cir. 1992). We review *de novo* a state court's conclusion that those factual circumstances demonstrate that petitioner received effective assistance of counsel. *See Strickland*, 466 U.S. at 698; *Winkler v. Keane*,

7 F.3d 304, 308 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1407 (1994).

In the state courts, petitioner raised the same ineffectiveness arguments that he advances in this petition on his motion to vacate the conviction. In addition, petitioner asserted that he had not learned of the plea offer until September 18, 1989, the first day of jury selection for petitioner's trial. After an extensive evidentiary hearing, the Orange County Court issued a written Decision and Order in which the court found that the plea offer had been previously communicated to petitioner, that petitioner had maintained his innocence from the time of his arrest through sentencing, and that petitioner had been adequately and competently represented throughout the proceedings. *See People v. Boria*, Index No. 2929-88, at 5-7 (Orange County Ct. July 14, 1992) (Byrne, J.). The Appellate Division subsequently affirmed this ruling, and the Court of Appeals denied leave to appeal. Therefore, unless petitioner provides us with convincing evidence to the contrary or the state court's conclusions are not supported by the record, we must accept the state court's factual determinations that petitioner was informed of the plea offer in a timely fashion and that he maintained his innocence up until sentencing. We must draw our own conclusions as to whether petitioner was effectively represented.

In the memorandum filed in support of his petition, Boria does not directly challenge the state court's finding that he was informed of the plea offer in a timely fashion. The state court reached that determination after a full evidentiary hearing, and there is evidence in the record to support the court's conclusion. In particular, the court

gave great weight to the testimony of two uninterested witnesses to whom petitioner mentioned, in early August 1989, that he had declined the plea offer. *See Boria*, at 5. The court noted that this testimony directly contradicted Boria's assertion that he had first learned of the plea offer at jury selection on September 18, 1989. *See id.* The court also accepted the testimony of Greenwald, corroborated by his employees and by a letter he wrote to Boria on August 15, 1988, that he had frequently discussed the plea offer with Boria during the summer of 1988. *See id.*, at 3-4. Because the state court's factual determination is fairly supported by the record and petitioner has not produced convincing evidence to the contrary, we will defer to the state court's finding that the plea offer was communicated to petitioner in a timely fashion.

Petitioner does challenge the state court's factual finding that petitioner insisted upon his innocence throughout the proceedings. As the state court noted, however, Greenwald testified that petitioner would not accept the plea offer because he was innocent, and the testimony of Greenwald's colleagues corroborated his statements with respect to "the offers and rejection of various pleas, and the defendant's posture of innocence and demand for a trial throughout the course of the proceeding." *Boria*, at 4. The testimony to which the state court refers includes that of a former associate of Greenwald's, who testified that petitioner turned down a subsequent plea offer of three years to life in January 1989, stating that if "he hadn't taken the one to three offer . . . [there was] no way he was going to take three to life. He wasn't going to go to jail or plead guilty to a crime he did not commit." *See Transcript of Hearing*, dated

March 4, 1992, at 511. Because it is not our place to second-guess the state court's evaluation of the credibility of that evidence, *see Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) ("Title 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."), we find that the record fairly supports the state court's conclusion.[2] Therefore, we will defer to the state court's factual finding that "based upon all the credible evidence, including his statement under oath at the time of sentence, the defendant maintained his innocence from the time of his arrest until this Court imposed sentence." *Boria*, at 6.

Petitioner contends nonetheless that he was prejudiced by Greenwald's failure to conduct an independent investigation of the case or to recommend that he accept the plea offer, because he would have accepted the plea agreement if he had been advised that there was "a real chance" that he would be found guilty at trial. *See* Affidavit of Oscar Boria, dated July 19, 1991, at ¶ 2. Aside from his own testimony,[3] petitioner argues that prior

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[2] Petitioner has also failed to present convincing evidence that the state court's factual determination was in error. However, because petitioner presented the asserted evidence of his receptiveness to a plea offer in the context of his arguments that he was prejudiced by Greenwald's conduct because he would have taken the offer if properly counseled, we will address his contentions when we evaluate whether he has demonstrated prejudice.

[3] We discount, as the state court apparently did, petitioner's own testimony that he would have accepted the plea offer if Greenwald had not told him that he had a good chance of winning the case. Petitioner's self-interest in making

statements that Greenwald had made to the court provide an objective indication that petitioner would have been receptive to a plea offer. Petitioner relies on *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988), *rev'd on other grounds*, 492 U.S. 902 (1989), as support for his argument. In *Turner*, the Sixth Circuit found that defendant was prejudiced by his counsel's recommendation that he refuse a plea offer. *See Turner*, 858 F.2d at 1206-07. The Sixth Circuit discounted as self-serving the defendant's own testimony that he would have taken the plea offer if he had been advised to do so. *See id.*, 858 F.2d at 1206. The court found, however, sufficient objective evidence to establish prejudice based on the defendant's counteroffer of a one-year plea agreement in response to a two-year proposal. This clear evidence of defendant's willingness to deal refuted the state's argument that the defendant's protestations of innocence would have prevented any plea agreement. *See id.* Petitioner in this case, however, does not advance similarly clear evidence of his willingness to accept a plea offer.

On September 25, 1989, Greenwald made a motion to dismiss the charge against his client or, in the alternative, to reinstate the original indictment. The basis for this motion was the prosecution's disclosure in August 1989 that it intended to introduce at trial two inculpatory statements made by petitioner on the day of his arrest. In his affirmation submitted with that motion, Greenwald

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this assertion is readily apparent. *Cf. Winkler*, 7 F.3d at 309 (approving state court's discounting of uncorroborated testimony of defendant's mother that he passed her note during trial indicating willingness to take plea).

stated that petitioner had rejected the plea offer in August 1988 based on his knowledge of the case at that time, and that if Greenwald had been aware of the statements, his advice to petitioner regarding the plea might have been different. *See* Affirmation of Gary Greenwald, dated September 25, 1989, at ¶¶ 7-8. Petitioner contends that these statements conclusively demonstrate that he was receptive to a plea offer. We disagree. At most, the statements reveal that *Greenwald* might have had a different understanding of his client's chances at trial had he known of the statements the prosecution intended to introduce. The statements to which petitioner refers do not demonstrate a reasonable probability that *petitioner* would have accepted a plea offer at any time before his conviction and sentencing.

Greenwald apparently also made an oral application to the trial court on September 20, 1989, to reinstate the original indictment "and thereby afford the Defendant an opportunity to be put back in the same position he would have been in . . . that is, in a position to plead guilty to Class B felony." *See* Greenwald Affirmation, ¶ 10. Petitioner contends that this statement also conclusively demonstrates that petitioner would have been receptive to a plea offer. To the contrary, we find that it is just as likely that Greenwald's application was simply a last-ditch effort to have his client tried on the less serious Class A-II charge. Under the circumstances, one would expect that if petitioner were in fact willing to plead guilty, Greenwald's affirmation would say so clearly. Moreover, by that point, the one-to-three year plea offer had been withdrawn, and there is no indication that the

District Attorney would have reinstated the offer. Therefore, this statement also does not conclusively demonstrate a reasonable probability that petitioner would have accepted the plea offer. Accordingly, petitioner has failed to satisfy the prejudice component of the *Strickland* test and his claim of ineffective assistance of counsel must fail.

B. Fourth Amendment Arguments

Petitioner also argues that the introduction at trial of the marked money seized by police officers who entered his place of business without a warrant violated his Fourth Amendment rights. This court's authority to review Fourth Amendment claims made in a petition for a writ of habeas corpus is sharply circumscribed: "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976); *Grey v. Hoke*, 933 F.2d 117, 121 (2d Cir. 1991). Relief is unavailable even if the federal court might have decided the issue differently. *See Capellan v. Riley*, 975 F.2d 67, 71 (2d Cir. 1992).

Petitioner does not argue that he was not afforded a full and fair opportunity to litigate his Fourth Amendment claim in the state court. Indeed, it is abundantly clear that petitioner's claim was fully considered by the state courts. The trial court held a lengthy suppression hearing before ruling that the evidence in question was admissible. The Appellate Division, Second Department,

found that the police had probable cause to enter the garage to arrest petitioner and that the marked money had therefore been seized incident to a lawful arrest. Petitioner also raised these Fourth Amendment issues in his application for leave to appeal to the Court of Appeals, which was denied. Petitioner's Fourth Amendment claims were therefore fully and fairly litigated in the state courts, and we have no authority to revisit the issue.

C. Insufficiency of the Evidence

Last, petitioner contends that the evidence adduced against him at trial was insufficient to establish his guilt beyond a reasonable doubt. In order to grant habeas relief on this ground, the court must find, "after viewing the evidence in the light most favorable to the prosecution, [that no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Bossett v. Walker*, 41 F.3d 825, 830 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1436 (1995). Moreover, "[t]he fact that not all of the inferences drawn from circumstantial evidence were inevitable does not negate the sufficiency of the evidence to prove the defendant's guilt beyond a reasonable doubt." *Thomas v. Scully*, 854 F. Supp. 944, 955 (E.D.N.Y. 1994) (citing *United States v. Brown*, 776 F. 2d 397, 403 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986)). The Second Circuit has stated that " 'the jury is exclusively responsible for determining a witness' credibility.' " *Bossett*, 41 F.3d at 830 (quoting *United States v. Strauss*, 999 F.2d 692, 696 (2d Cir. 1993)).

The jury certainly had a reasonable basis for finding petitioner guilty of the crime for which he was convicted. Jeffrey Cannella, an informant whose cooperation with the police had previously resulted in successful operations, testified that he had arranged the sale with petitioner and purchased the drugs from him. His testimony was corroborated by his production of the cocaine shortly after the sale and by the discovery of the marked money in petitioner's pocket. Petitioner's counsel cross-examined Cannella extensively in an attempt to discredit his testimony. The jury therefore had an opportunity to consider Cannella's credibility carefully before finding petitioner guilty. We cannot say that the jury's decision was irrational. Therefore, petitioner's claim of insufficiency of the evidence fails.

CONCLUSION

For the reasons set forth above, Boria's petition for a writ of habeas corpus is denied.

SO ORDERED.

Date: October 6, 1995
White Plains, New York

/s/ William C. Conner
Senior United States
District Judge

APPLICATIONS FOR LEAVE TO APPEAL – CRIMINAL

83 N.Y.2d 1001

TITLE	SOURCE	DISPOSITION
People v. Abdullah	205 A.D.2d 636, 614 N.Y.S.2d 290 App.Div. 2, Kings 6/13/94	Dismissed 7/28/94 (Smith, J.)

83 N.Y.2d 1002

People v. Adams	205 A.D.2d 548, 614 N.Y.S.2d 275 App.Div. 2, Queens 6/6/94	Denied 7/22/94 (Smith, J.)
People v. Aleem	App.Div. 4, Erie 6/20/94	Dismissed 7/28/94 (Bellacosa, J.)
People v. Bacic	202 A.D.2d 234, 608 N.Y.S.2d 452 App.Div. 1, New York 3/8/94	Denied 7/19/94 (Ciparick, J.)
People v. Bandera	204 A.D.2d 340, 611 N.Y.S.2d 290 App.Div. 2, Westchester 5/2/94	Denied 7/8/94 (Smith, J.)
People v. Banks	204 A.D.2d 473, 614 N.Y.S.2d 163 App.Div. 2, Kings 5/9/94	Denied 7/15/94 (Smith, J.)

People v. Barnes (Alfred)	199 A.D.2d 274, 604 N.Y.S.2d 218 App.Div. 2, Nassau 12/6/93	Denied 7/26/94 (Ciparick, J.)
People v. Barnes (Jimmy)	204 A.D.2d 341, 611 N.Y.S.2d 608 App.Div. 2, Queens 5/2/94	Denied 7/26/94 (Bellacosa, J.)
People v. Bashar	204 A.D.2d 1023, 613 N.Y.S.2d 89 App.Div. 4, Monroe 5/27/94	Denied 7/22/94 (Smith, J.)
People v. Bastardo	203 A.D.2d 183, 611 N.Y.S.2d 151 App.Div. 1, New York 4/26/94	Denied 7/5/94 (Levine, J.)
People v. Batten	App.Div. 2, Kings 5/20/94	Dismissed 7/28/94 (Bellacoa, J.)
People v. Beers	200 A.D.2d 951, 607 N.Y.S.2d 898 App.Div. 2, Westchester 1/18/94	Denied 7/7/94 (Ciparick, J.)
People v. Benjamin	204 A.D.2d 996, 612 N.Y.S.2d 517 App.Div. 4, Monroe 5/27/94	Denied 7/26/94 (Bellacosa, J.)
People v. Bennett	204 A.D.2d 1056, 614 N.Y.S.2d 346 App.Div. 4, Monroe 5/27/94	Denied 7/1/94 (Smith, J.)

People v. Bobet	200 A.D.2d 950, 607 N.Y.S.2d 897 App.Div. 1, Bronx 1/20/94	Denied 7/7/94 (Ciparick, J.)
People v. Boria	204 A.D.2d 652, 612 N.Y.S.2d 80 App.Div. 2, Orange 5/23/94	Denied 7/22/94 (Smith, J.)
People v. Brooks	App.Div. 2, Nassau 6/24/94	Dismissed 7/26/94 (Ciparick, J.)
People v. Brown (Harold)	205 A.D.2d 567, 613 N.Y.S.2d 211 App.Div. 2, Queens 6/6/94	Denied 7/26/94 (Bellacosa, J.)
People v. Brown (Isaiah)	App.Div. 1, New York 4/21/94	Dismissed 7/25/94 (Smith, J.)
People v. Brown (Isaiah)	App.Div. 1, New York 6/16/94	Dismissed 7/25/94 (Smith, J.)
People v. Brown (Kevin)	201 A.D.2d 870, 610 N.Y.S.2d 896 App.Div. 4, Monroe 2/4/94	Denied 7/18/94 (Ciparick, J.)
People v. Brown (Philip)	156 A.D.2d 142, 587 N.Y.S.2d 725 App.Div. 2, Nassau 9/14/92	Dismissed 7/8/94 (Smith, J.)

204 A.D.2d 652

The PEOPLE, etc., Respondent,
v.
Oscar BORIA, Appellant.

Supreme Court, Appellate Division,
Second Department.

May 23, 1994.

Robert N. Isseks and John S. McBride, Goshen, for appellant.

Francis D. Phillips II, Dist. Atty., Goshen (David Huey and John Goldsmith, of counsel; Gregory Bloshinsky and Paul Darcy, on the brief), for respondent.

Before BALLETTA, J.P., and MILLER, LAWRENCE and GOLDSTEIN, JJ.

MEMORANDUM BY THE COURT.

Appeal by the defendant (1) from a judgment of the County Court, Orange County (Byrne, J.), rendered January 4, 1990, convicting him of criminal sale of a controlled substance in the first degree, upon a jury verdict, and imposing sentence, and (2) by permission, from an order of the same court, dated July 14, 1992, which, after a hearing, denied his motion to vacate the judgment of conviction pursuant to CPL 440.10. The appeal from the judgment brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress physical evidence.

ORDERED that the judgment and the order are affirmed.

Contrary to the defendant's contention, the People met their burden of establishing that the police had probable cause to arrest him in his place of business. The evidence adduced at the pretrial hearing established that an identified police informant, who was on lifetime parole pursuant to a narcotics-related conviction, indicated to the police that he had arranged to purchase a quantity of drugs from the defendant at his place of business. The informant had cooperated with law enforcement officials on 6 or 7 prior occasions, leading to the arrest and conviction of two individuals. At the arranged date and time, the informant, wired with a transmitting device, carrying prerecorded money, and followed by a surveillance van and an unmarked police car, stopped his own car in front of the towing garage. The sale was consummated, and the informant met with one of the officers involved and turned over four plastic bags containing a substance later determined to be cocaine. A team of officers then approached the garage, with one of them making eye contact with the defendant, with whom he was acquainted, through a window. The defendant then ran behind the front door of the garage, and when the officers attempted to enter they found that the door was locked. After breaking the door down, they discovered several individuals inside, one of whom was the defendant, who had been running toward the back door. The defendant was arrested, and a search of his person incident to that arrest revealed $2,000 of prerecorded money.

Based upon the foregoing, the hearing court properly denied the branch of the defendant's omnibus motion which was to suppress the physical evidence obtained

incidental to his arrest. The police, relying upon reliable information from a named source who had just engaged in a drug transaction with the defendant, and upon their own observations which verified that information, possessed probable cause to enter the garage immediately after the drug transaction was completed and arrest the defendant therein (*see*, People v. DiFalco, 80 N.Y.2d 693, 594 N.Y.S.2d 679, 610 N.E.2d 352). As the search of the defendant was incident to a lawful arrest, suppression of the prerecorded money was properly denied.

Turning to the issues raised relating to the trial, viewing the evidence in the light most favorable to the prosecution (*see*, People v. Contes, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, upon the exercise of our factual review power, we are satisfied that the verdict was not against the weight of the evidence (*see*, CPL 470.15[5]).

We have considered the remaining contentions raised by the defendant on his appeal from the judgment of conviction, including his contention that the sentence imposed was excessive, and find them to be without merit.

With respect to the appeal from the order denying, after a hearing, the defendant's motion to set aside the judgment of conviction on the ground that he had been denied effective assistance of counsel, issues of credibility are for the trier of fact and will not lightly be set aside absent a showing of lack of support in the record (*see*, People v. Di Girolamo, 108 A.D.2d 755, 485 N.Y.S.2d 98). As there is sufficient credible evidence in the record to

support the hearing court's finding that the defendant was adequately represented and that he was made aware of a plea offer of 1 to 3 years imprisonment, and told his trial counsel to reject it, we decline to disturb that finding. Viewed in its entirety, we agree with the hearing court's determination that the representation received by the defendant was not deficient (*see*, People v. Benn, 68 N.Y.2d 941, 510 N.Y.S.2d 81, 502 N.E.2d 996; People v. Baldi, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400).

STATE OF NEW YORK
COUNTY COURT: ORANGE COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,	INDICT. NO. 88-440-00
-against-	INDEX NO. 2929-88
OSCAR BORIA,	DECISION AND ORDER
Defendant.	

BYRNE, J.

By this proceeding, defendant seeks to vacate a judgment of conviction rendered after trial, sentencing him on January 4, 1990 to a term of 20 years to Life.

The defendant was originally charged with a co-defendant under Indictment 88-246 with the crime of Criminal Possession of a Controlled Substance in the Second Degree. On September 20, 1988, a superceding indictment under the above-captioned number was filed against both defendants, charging Criminal Possession of a Controlled Substance in the First Degree. It was under that indictment that the defendant was tried and convicted.

Defendant contends that he was inadequately represented by counsel. It is his contention that sometime between his arrest on May 13, 1988 and the date of the superceding indictment on September 20, 1988, counsel for the defendant failed to convey to him the District Attorney's offer that he would be allowed to plead guilty to a reduced count under that indictment with a recommended sentence of 1 to 3 years in States Prison.

The Court notes that under the subsequently filed superceding indictment such a plea would be legally impermissible. A hearing was granted for:

> "[I]n the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10." *People v. Brown* 45 NY2d 282, 283-4.

A hearing was held between February 6, 1992 and March 5, 1992 to explore the issues. As a result of that hearing, the Court finds the following facts:

FINDING OF FACTS

As material in this hearing, it was the testimony of the defendant that his attorney never advised him that the District Attorney had offered a plea with the recommendation of 1 to 3 years in States Prison if he were to accept. It was the defendant's contention that Mr. Greenwald, his attorney, always told him that he had a unique case, that he could win it, and was that the best he could get was 3 years to Life in prison. He was told for the first time of the offer of 1 to 3 years in States Prison in the course of jury selection, and at that time the plea was not offerable, for the initial indictment (charging a Class A-II Felony had been superceded (by a Class A-I Felony charge). The defendant contended throughout that he was never advised to plead guilty and was always advised to go to trial and that he could "beat the case". It was it [sic] never suggested that the Court had agreed to any sentence recommendation that might be made by the District Attorney.

Defendant now contends that had he been informed that he could satisfy the charge against him by serving 1 to 3 years in States Prison, he would have reacted favorably. In an attemt [sic] to support his position, the defendant called Thomas Murphy, Esq., his original attorney on the case. Mr. Murphy testified that he represented the defendant in a bail hearing and after successfully getting the defendant out on bail, he met with the defendant and members of his family. Mr. Murphy had no independent recollection of an offer to plead to a Class B felony or sentence recommendation of 1 to 3 years in States Prison, and no recollection of ever conferencing the case with a representative of the District Attorney's office. There came a time when he received notification from Mr. Greenwald that he was substituted as counsel. Mr. Murphy recalls that he advised the defendant that he should seriously consider a plea, but does not recollect discussing the defendant's guilt or innocence.

Mr. Greenwald testified, in substance, that he was retained by the defendant on or about June 10, 1988 at a meeting in his office in Wurtsboro, New York and from that time forward the defendant was often present in his office. It was Mr. Greenwald's recollection that the possibility of a reduced plea from the Class A-II then charged in the indictment to a B and a recommended sentence of 1 to 3 years in States Prison was frequently discussed with the defendant, but the defendant would not accept the plea, maintaining that he was innocent. It was Mr. Greenwald's testimony that the defendant wanted his day in court because he felt that he was dealt with unfairly when he was arrested in his garage in the presence of his children.

There came a time, according to Mr. Greenwald, when he was advised in Chambers by the District Attorney that the plea offer would be withdrawn and a superceding indictment would be handed up, charging a Class A-I felony. Mr. Greenwald testified that at that time he knew that this meant the reduced plea offer was no longer available as a matter of law. A two-page letter dated August 15, 1988 was introduced into evidence in which Mr. Greenwald purported to explain, in writing, to the defendant his status as a result of the rejection of the plea. The defendant claimed never to have received that letter.

Also testifying in the proceeding were John Duguid, Esq., Shephan Schick, Esq., and James Neylon,.a paralegal. All three witnesses worked with Mr. Greenwald during the course of his representation of the defendant and testified to corroborate various aspects of Mr. Greenwald's testimony regarding the offers and rejection of various pleas, and the defendant's posture of innocence and demand for a trial throughout the course of the proceeding.

Also testifying for the People were Steven McIlroy and Major Blake Muthig (retired from the New York State Police). The Court gives great credibility to the testimony of these two non-interested witnesses concerning a conversation the two had with the defendant in McIlroy's gasoline station regarding his acknowledging and declining of an offer of 1 to 3 years in States Prison in disposition of the charges. The Court also gives great credibility to the recollection of Retired Major Blake Muthig who placed the conversation as having occurred during the course of the suppression hearing of 1989. This places the

conversation prior to the commencement of the trial, which was Mr. Boria's first recollection of receipt of the information.

This Court is satisfied that the defendant, based upon this testimony, has failed to meet his burden of proof. The Court also notes that the defendant in this proceeding has not claimed innocence or requested a retrial. This Court further notes the legal impossibility of placing the defendant in a posture to afford him the opportunity to accept a 1 to 3 year sentence in satisfaction of the charge pending against him. The defendant seeks the impossible. Realizing that a new trial under the indictment will avail him nothing, he seeks to be placed in a legally impermissable position.

Based on the credible evidence, it appears that the defendant is seeking the best of both worlds. The slight problem that he faces is the lack of credible facts to support his contentions.

The defense has presented no new evidence, but has marshaled a brilliant collateral attack upon the credibility and integrity of the attorney who represented him in this matter. This Court will not, and need not, consider that collateral evidence because the defense has not presented a factual basis to meet its initial burden of credibility on the part of Mr. Boria. The defendant received a proper and adequate defense. He was appropriately and adequately advised throughout the proceedings and based upon all the credible evidence, including his statement under oath at the time of sentence, the defendant maintained his innocence from the time of his arrest until this Court imposed sentence. This was his absolute right. He

placed the system to the test, he received his trial, and he was found guilty upon the evidence. He was sentenced based upon the evidence adduced in the course of the trial and the jury's verdict.

In his attempt to avoid the unavoidable he has grasped at a straw which, in this Court's opinion, lacks the factual roots to support his weight. The inescapable conclusion that this Court must reach after being involved in a lengthy suppression hearing, jury trial and post-conviction proceeding, is that the defendant's guilt was established beyond a reasonable doubt, that he was adequately and competently represented throughout the proceedings. The defendant knowingly and intelligently made decisions that places him in the position in which he now finds himself.

The aforesaid constitutes the decision and order of the Court.

Dated: Goshen, New York
July 14, 1992

ENTER

/s/ Thomas J. Byrne
HON. THOMAS J. BYRNE
County Court Judge

TO: HON. FRANCIS D. PHILLIPS, II
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1332 – August Term, 1995

Petition for Rehearing
Submitted: May 17, 1996

Decided July 17, 1996

Docket No. 95-2688

OSCAR BORIA,

Petitioner-Appellant,

–v.–

JOHN KEANE, Superintendent, Sing Sing Correctional Facility,

Respondent-Appellee.

Before:

OAKES and PARKER, *Circuit Judges,*
and KNAPP, *District Judge.**

Upon consideration of petition for rehearing, held: the Antiterrorism and Effective Death Penalty Act of 1996 does not apply retroactively to habeas corpus petitions not involving death sentences filed prior to the statute's enactment.

---

* Honorable Whitman Knapp of the United States District Court for the Southern District of New York, sitting by designation.

Per Curiam:

Oral argument[1] occurred in this case on March 29, 1996. The panel issued its decision on May 3, 1996. The panel concluded, and continues to hold, that Oscar Boria's lawyer failed to meet the minimal requirements of constitutional competency when he failed to give his client *any* advice as to the wisdom of accepting or rejecting the state's initial plea offer, which, if accepted, would have resulted in a sentence of one to three years. Lacking such counsel, Boria rejected the plea offer. Upon his rejection, the state re-charged Boria with a more serious crime. Boria was convicted at trial and sentenced to twenty years to life. Our initial opinion in this case, 83 F.3d 48, held (1) Boria was deprived of his constitutional right to effective counsel, and (2) under the circumstances of this case that deprivation resulted in prejudice to Boria.[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

The state has petitioned for rehearing. The state argues in its petition that the Antiterrorism and Effective Death penalty Act of 1996, P.L. 104-132, (hereafter "the

---

[1] The state's lawyer did not attend oral argument and did not inform the court of his intention not to attend oral argument.

[2] The initial opinion in this case did *not* hold that it is constitutionally ineffective assistance of counsel when a lawyer's advice regarding the wisdom of accepting or rejecting a plea offer fails to convince the client. We held only that the absence of any advice constitutes ineffective assistance of counsel, and that under the circumstances of this case (where, the lawyer believed that rejecting the plea was suicidal, and there was a vast disparity between the sentence to be served upon rejection of the plea offer and subsequent conviction) the absence of the advice prejudiced the client.

new statute") which was signed into law on April 24, 1996, applies to this case and that the new statute's changes in the law of habeas corpus warrant a different outcome. Section 104 of the new statute states in relevant part that the writ of habeas corpus shall not be granted unless the state court adjudication of the claim:

> (1) resulting in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The state argues in its petition that the state court proceedings did not violate a clear pronouncement of the United States Supreme Court, notwithstanding the portion of *Von Moltke v. Gillies*, 332 U.S. 708 (1948), which the initial opinion contains. Boria, pursuant to our order, submitted responsive briefing on the issue of the applicability of the new statute. We summarily reject the state's other arguments in its petition for rehearing.

In this case Boria suffered incompetent counsel prior to the passage of the new act. Furthermore, collaterally attacking his sentence was Boria's only means of vindicating his right to effective counsel. Assuming, without deciding, that the new statute would require a different outcome, application of the new statute to these circumstances would be retroactive. *See Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1499 (1994) ("the court must ask whether the new [statute] attaches new legal consequences to events completed before its enactment.").

Because application of the new statute to this case would be retroactive, the next step is to discern whether Congress intended the new statute to apply retroactively. This inquiry is guided by the presumption, "deeply rooted in our jurisprudence," that absent some clear signal from Congress, a statute will not apply retroactively. *Id.* at 1497, 1501. Against this background, we look to the new statute to see if Congress has indicated an intent for it to apply to pending cases. While Congress has spoken clearly in some portions of the new statute with respect to the application of the statute to pending cases, *see, e.g.*, § 107(c) (applying amendment to death penalty habeas cases "to cases pending on or after the date of enactment of the Act"), § 211 (applying new provisions relating to restitution "to the extent constitutionally permissible, . . . in cases in which the defendant is convicted on or after the date of enactment"), § 903(c) (relating to representation fees in criminal cases), in the context of non-capital habeas cases the statute's silence is striking. This silence, coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case.

Accordingly, we affirm the panel's previous holding in this case (with clarifications contained in this opinion, *see* footnote 2 above).

No. 96-628 (2)

Supreme Court, U.S.
FILED
NOV 20 1996

IN THE

Supreme Court of the United States

October Term, 1996

JOHN KEANE, Superintendent, Sing Sing Correctional Facility,

Petitioner,

against

OSCAR BORIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit was correct in determining that trial counsel was constitutionally deficient by failing to give *any* advice to respondent as to whether to accept a proffered plea bargain when counsel believed it was suicidal to reject the plea and go to trial?

2. Whether the Second Circuit's holding that effective assistance of counsel includes counsel's informed opinion as to what plea should be entered constitutes a new rule within the meaning of *Teague v Lane*, and whether the District Attorney waived this argument by failing to present it to the District Court or to the Second Circuit until a motion for reargument?

3. Whether the Second Circuit correctly determined that the "Antiterrorism and Effective Death Penalty Act of 1996" does not apply retroactively to habeas corpus petitions not involving death sentences filed prior to the statute's enactment?

4. Whether trial counsel's uncontroverted repeated admissions that he did not advise respondent as to whether to accept the proffered plea bargain under the circumstances of this case constituted a sufficient record upon which the Second Circuit based its decision?

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BRIEF IN OPPOSITION TO THE PETITION

SUMMARY OF THE ARGUMENT

The Second Circuit correctly determined that trial counsel (Gary Greenwald) was constitutionally ineffective by failing to give *any* advice to respondent as to whether to accept the proffered plea bargain when counsel believed it was suicidal to reject the plea and go to trial. This holding was based upon uncontroverted repeated admissions by Greenwald during his lengthy testimony during the post-conviction hearing that he did not give any such advice to respondent and that he, Greenwald, believed that in the circumstances of this case it would be suicidal to go to trial. The District Attorney's argument to this Court is based upon repeated mischaracterizations of this holding.

First, the District Attorney falsely states that the Second Circuit held that trial counsel now have a Sixth Amendment duty to *convince* a client to accept a plea when the client professes his innocence. So that there would be no doubt that this is *not* the holding, the Second Circuit's July 17, 1996 opinion—which denied the District Attorney's motion to reargue—clarified its initial opinion as follows:

> The initial opinion in this case did *not* hold that it is constitutionally ineffective assistance of counsel when a lawyer's advice regarding the wisdom of accepting or rejecting a plea offer fails to convince the client. We held only that the absence of any advice constitutes ineffective assistance of counsel, and that under the circumstances of this case (where, the lawyer believed that rejecting the plea was suicidal, and there was a vast disparity between the sentence to be served upon rejec-

> tion of the plea offer and subsequent conviction) the absence of the advice prejudiced the client.

App. 43, n 2.

Thus the District Attorney insists upon misstating the Second Circuit's holding when he tells this Court that (1) the holding below indicates "that Greenwald's representation violated [respondent's] federal right to counsel because Greenwald failed to recommend acceptance of what it deemed to be a beneficial plea offer, failed to take stronger steps to overcome [respondent's] resistance to accepting such a plea, and failed to enlist the assistance of [respondent's] family members to obtain that result", (2) "the Second Circuit has created a new rule that counsel, in dealing with a client who adamantly professes his innocence, must nonetheless persist in recommending acceptance of a plea offer which counsel deems beneficial but which the client has already vowed to reject", and (3) "the Second Circuit would now require counsel to convince a client, who maintains his innocence, to plead guilty, and to enlist the client's family members' assistance in achieving that result." Petition, pp 6-8.

These repeated misstatements by the District Attorney of the Second Circuit's holding, read in conjunction with the District Attorney's inexcusable failure to even mention the July 17th clarification, can only be interpreted as a deliberate attempt to mislead this Court.

Second, the District Attorney fails—through no fault on his part—to bring to this Court's attention the corrected opinion of the Second Circuit, dated October 25, 1996 which incorporated Errata duly filed May 21st and July 11th, 1996. This Errata deleted the following language from the Second Circuit's initial

opinion (Petitioner's App. 9), language that quoted the Trial Manual 5 for the Defense of Criminal Cases:

> and often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a not guilty plea would be destructive.

Errata of the Second Circuit, annexed hereto at Respondent's Appendix 1. A copy of the Second Circuit's corrected opinion is annexed hereto at Respondent's Appendix 2.

The fact that this language was deleted makes it clear that the Second Circuit did not declare a duty to *persuade*, and that its holding rests solely upon counsel's duty to *advise*. Thus the District Attorney's reliance upon this quoted language at p 13 of his Petition is, albeit unknowingly, misplaced.

Along with his mischaracterizations of the holding below, the District Attorney refuses to acknowledge the salient and distinguishing point of this case: Greenwald repeatedly testified that he did not give respondent *any* advice on whether to accept the proffered plea. This allows the District Attorney to trumpet a false alarm to this Court that the Second Circuit "will require the federal courts to review vast numbers of challenges to state criminal convictions that would have been barred under previously settled principles of law." Petition, p 7. This ridiculous contention could be taken seriously only if it is expected that lawyers around this Nation will admit in post-conviction hearings that they flatly refused to give their clients any advice as to whether a particular plea should be accepted or rejected.

The District Attorney, in other words, is making the frivolous contention that lawyers *en masse* will admit they failed to fulfill this most basic obligation, a duty the Second Circuit correctly observed "is so well understood by lawyers practicing in th[at] Circuit that the question has never been litigated", and which was enunciated by this Court almost a half century ago in *Von Moltke v Gillies,* 332 U.S. 708, 721 (1948)

STATEMENT OF THE CASE

A hearing on appellant's N.Y.S.C.P.L. 440.10 motion commenced on February 26, 1992, and concluded on March 6, 1992.[1] The following is a summary of the record as developed during that hearing.

On May 24, 1988, Orange County Indictment No. 88-246 was filed with the trial court charging respondent with the class A-II felony of criminal sale of a controlled substance in the second degree. Respondent was then represented by Thomas Murphy, Esq. of Newburgh, New York, who appeared with respondent at his arraignment when a plea of not guilty was entered.

Greenwald was retained by respondent on June 10, 1988. Two months later, on August 10, 1988, he appeared before the trial court without respondent[2] and rejected the People's plea offer of 1 to 3 years imprisonment, *the lowest sentence that could be offered by law*. The District Attorney then confirmed on the record that the People did "intend to seek a superseding

---

[1]Greenwald's testimony alone spanned 270 pages of hearing transcript.

[2]Greenwald testified that respondent was in his office on the morning of August 10, 1988. Greenwald offered no explanation why he did not have respondent appear with him that afternoon to reject the plea offer.

indictment" and the next day, August 11, 1988, the District Attorney sent Greenwald notice of Grand Jury presentment.[3] On September 20th, the superseding indictment (No. 88-440) was handed up charging respondent with criminal sale of a controlled substance in the first degree, a class A-I felony. Respondent could never be offered the 1-3 plea again.

Greenwald testified a number of times during the post-conviction hearing that he never advised respondent as to whether he should accept or reject the People's 1-3 plea offer:

> Q Did you take a position in advising him whether to accept or reject a plea?
>
> A No, I did not.
>
> * * *
>
> Q I never advised Mr. Boria . . . that I can recall that he should accept the plea or reject the plea. Did you hear my response, Mr. McBride?[4]
>
> * * *
>
> Q And when did you first advise Mr. Boria with respect to accepting or rejecting the proffered plea?

---

[3]It is not in dispute that on August 10, 1988, Greenwald not only knew that he was rejecting the best plea offer allowed by law, he also knew that as a result of that rejection his client would be indicted on an A-I felony making that plea offer forever unavailable as a matter of law.

[4]John S. McBride was the attorney conducting the examination.

A Mr. McBride, one, I never did, and so it's --

Q Thank you.

A So it's assumed I didn't.

Q If you never did, we don't have to go further.

A I said that before.

Greenwald never advised respondent "with respect to accepting or rejecting the proffered plea" despite the fact that the offer was the best authorized by law and, by rejecting such offer and allowing a superseding indictment to be handed up, that offer would be irrevocably withdrawn as a matter of law and respondent would face up to 25 years to life.

Respondent stressed in his testimony that had Greenwald advised him in August, 1988, that he was being offered a plea with a sentence of 1 to 3 years and that there was a real chance that he could be convicted, he would have accepted the offer. Respondent explained that he never received that advice. Respondent testified how Greenwald always conveyed to him, whenever he tried to discuss plea bargaining, that his case was "unique" and that he shouldn't worry about it as everything would be alright. Greenwald would also tell respondent that he, Greenwald, rarely lost a case.[5]

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[5]Respondent also testified how the only thing Greenwald ever wanted to speak with him about was money. He described in detail the way Greenwald repeatedly abused him in order to get paid more. During the trial itself, for example, Greenwald would take respondent out of the courthouse at lunch and tell him that he had to get him another one or two thousand dollars.

(continued...)

Greenwald's silence about whether to accept or reject the plea offer certainly gave respondent, who had no prior experience in the criminal justice system, reason to believe that plea bargaining was not something which was in his best interest.

Greenwald tried to answer respondent's claim that he was not properly advised by testifying that respondent was in his office repeatedly during the summer months of 1988 during which time they discussed the 1-3 offer and, according to Greenwald, respondent stated over and over that he was "absolutely innocent" and that no plea bargain would be acceptable to him.

This 1992 Greenwald version of these pre-August 10, 1988 conferences—that respondent was adamant about not pleading guilty—is belied by the completely different explanation Greenwald gave to the trial court on the eve of respondent's trial, when Greenwald was attempting desperately to get the plea offer back from the District Attorney. In his pretrial September 25, 1989 affirmation,[6] Greenwald swore to the trial court that it was

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[5](...continued)
Greenwald would repeatedly threaten, "If you don't have any more money for me, I'm going to drop you right now."

[6]Greenwald's 17 page September 25, 1989, affirmation was made in support of his motion seeking an order "granting a renewal of the Defendant's Motion to Dismiss pursuant to Section 210.40 of the Criminal Procedure Law, submitted April 21, 1989, and decided June 8, 1989, or in the alternative granting the Defendant's Motion made orally before this Court on September 20, 1989, dismissing the superseding Indictment and reinstating the original Indictment number 88-246, under which the Defendant was originally indicted." This motion was based upon what Greenwald claimed to be "newly discovered evidence which was not

(continued...)

because of the District Attorney's late notice of intent to use certain statements that respondent rejected the 1-3 plea offer:

> [I]t should be noted that initially the Defendant was indicted as [sic] a Grand Jury presentation for a Class A-2 Felony. During the plea negotiations the prosecutor's offer was to allow the Defendant to plead guilty to a B Felony, with a promise of a 1 to 3 year term of imprisonment, in satisfaction of the original Indictment. *Based on his knowledge of the prosecutor's case*, including the lack of statements attributed to the Defendant, as stated by the prosecutor, *the Defendant rejected the plea offer*.[7]

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[6](...continued)
available to the Defendant at the time the original motion was made. Specifically, the existence of the statements attributed to the Defendant, in the possession of the prosecutor". Greenwald stated that the prosecutor first made him aware of the statements during the course of a suppression hearing in August, 1989, and that on September 19, 1989, during jury selection, the prosecutor served formal notices of intent to use the statements pursuant to CPL Sec. 710.30

[7]In the next paragraph of the September 25, 1989, affirmation, in order to get the trial court to give respondent a second chance to consider the 1-3 plea offer, Greenwald swore:

> As noted, at the time of the plea bargain negotiations in question, neither the Defendant nor his attorney were aware of the existence of the alleged two (2) statements in question. Even more significantly, the prosecutor had, in fact, informed the Defendant and this Court, that no such statements existed. It is submitted, that had the attorney for the Defendant been aware of the existence of and the prosecutor's intent to use those statements for any purpose whatsoever, during the course of trial, then his advise [sic] to the Defen-

(continued...)

Greenwald's September 25, 1989 affirmation further requests the trial court to "afford the Defendant an opportunity to be *put back* in the same position he would have been . . . that is, in a position to plead guilty to [a] Class B Felony", which is to say, "the same position in which he would have been, relative to considering the offered plea bargain." Greenwald's language is unambiguous; its meaning is precise. In September, 1989, after it was too late, Greenwald was trying to get the 1-3 plea offer back. Nothing could more strongly indicate that respondent would have been receptive to a plea bargain in August, 1988 had he been properly counseled.[8]

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[7](...continued)

dant, relative to accepting or to rejecting the proffered offer of a plea to a B felony, may well have been different.

The Second Circuit found, as a matter of law, that Greenwald was not telling the truth when he swore to the trial court that the prosecutor denied the existence of the statements. Petitioner's App 11, n 6.

[8]During the post-conviction hearing, however, Greenwald denied the undeniable and swore that when he made these applications in September, 1989, he knew that respondent would never have accepted the 1-3 plea even if it had been offered to him again.

Greenwald testified that the language of his affirmation did not mean that he wanted respondent to have a second chance to take the 1-3. Rather it meant that he simply wanted respondent to go to trial on an A-II felony instead of an A-I. Thus, Greenwald's hearing testimony amounted to an admission that his September, 1989, oral and written applications were based upon an intentional misrepresentation to the trial court. If indeed Greenwald knew that respondent would not have pled guilty under any circumstances (his story at the hearing), then he was being dishonest when he stated, originally, that the reason for his motion to dismiss the superseding indictment (drastic relief to say the least) was to put respondent back "in a

(continued...)

But there are even more reasons for rejecting Greenwald's testimony—as adopted by the District Attorney—that because of respondent's purported adamance, Greenwald didn't have to give respondent any advice. First, Greenwald's file does not contain a single notation with respect to the 1-3 plea offer or his purported discussions about it with respondent prior to August 10, 1988. Second, Greenwald's file is devoid of even a shred of documentation to the effect that respondent was adamant about his innocence and that he would not consider a negotiated plea. Third, Greenwald had no recollection of having had any discussion with the District Attorney concerning a plea offer prior to August 10, 1988. Fourth, the District Attorney's file jacket is devoid of any notation that the 1-3 plea offer was ever conveyed to Greenwald prior to August 10, 1988.

Fifth, Greenwald testified that when Respondent first came into his office respondent informed him that he had learned about the offer from his prior counsel, Murphy. But Murphy testified that he could not recall ever learning of a plea offer from the District Attorney's office while he was representing respondent and that he therefore had no recollection of ever conveying any offer to respondent, let alone an offer of 1-3. Murphy explained that about 65% of his practice had been in the criminal law and that it had always been his procedure since he began practicing in 1979 to make a notation on his file of any plea offer which is made by the District Attorney. But when Murphy, in preparing for his testimony, reviewed the file he kept

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[8](...continued)
position to plead guilty to Class B Felony".

Whichever version is believed, the record demonstrates that Greenwald is not a credible witness, a fact that the Second Circuit adopted "as a matter of law". Petitioner's Appendix 11, n 6.

while representing respondent, he saw that there was no such notation of a plea offer contained anywhere in or on it.[9]

Obviously, there is no truth to the District Attorney's unsupported claim to this Court that "Greenwald was retained in this case only because [respondent] disagreed with the advice of his former attorney, who wanted [respondent] to plead guilty in exchange for the one-three year sentence." Petition, pp 10-11.

REASONS FOR DENYING THE WRIT

ARGUMENT

POINT I

Respondent was denied his Sixth Amendment right to effective assistance of counsel by Greenwald's failure to express an opinion as to whether the 1-3 plea offer should be accepted or rejected

In *Von Moltke v Gillies,* 332 U.S. 708, 721 (1948), the United States Supreme Court stated that "counsel *must*, after making an independent examination of the facts, circumstances, pleadings and laws involved, *offer his informed opinion as to what plea should be entered.*" (emphasis added). The record shows that

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[9]Significantly, Murphy testified that prior to his testimony in the post-conviction hearing he received two telephone calls from Greenwald in which Greenwald tried to refresh Murphy's recollection that he, Murphy, had in fact told respondent about the 1-3 offer. Murphy testified that he thereupon reviewed his file and confirmed that he indeed had no such recollection at all. Respondent confirmed in his testimony that Murphy never discussed any plea offer with him—they never got to that point.

Greenwald made no attempt to fulfill this duty to respondent. Indeed, Greenwald was emphatic about his never having "offer[ed] his informed opinion as to what plea should be entered." *Id.*

In *Walker v Caldwell,* 476 F.2d 213, 218 (5th Cir. 1973), the Court of Appeals for the Fifth Circuit made the following observation which applies with undeniable force to the instant appeal:

> The key words are "effective assistance of counsel." Much of the language of our recent cases in the area refers to whether the assistance was "effective". We must not ignore the equally important first requirement that appointed counsel actually and substantially *assist* his client in deciding whether to plead guilty.

Walker v Caldwell, 476 F.2d at 224 (emphasis in original).

In the States of Pennsylvania and Washington it has been held that, although the decision to plead guilty ultimately rests with the client, an attorney is obligated to assist in the decision making process and has the duty to give his client the benefit of his professional advice. *Commonwealth v Napper,* 385 A2d 521, 524 (S.C. Pa. 1978); *Washington v James,* 739 P.2d 1161. *See also, U.S. v Villar,* 416 F.Supp. 887 (S.D.N.Y 1976) (effective assistance of counsel "includes counsel's informed opinion as to what pleas should be entered.")

An attorney's duty to advise his client with respect to plea bargaining, *even when the client insists upon his innocence*, is set forth in I Amsterdam, Segal, and Miller, Trial Manual for the Defense of Criminal Cases (1967) and was noted by the Second Circuit below:

> The decision whether to plead guilty or contest a criminal charge is probably the most important single decision in any criminal case. This decision must finally be left to the client's wishes; counsel cannot plead a man guilty, or not guilty, against his will. But counsel may and must give the client the benefit of his professional advice on this crucial decision. (the word "must" was emphasized by the author; otherwise, the emphasis was the Second Circuit's)

As also noted by the Second Circuit, the Code of Professional Responsibility also supports a "duty to advise rule". Ethical Consideration 7-7, states that "[a] defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable . . ."

At the post-conviction hearing, Greenwald testified that he did not advise respondent on the crucial decision of whether or not to plead guilty because respondent insisted upon his innocence. The District Attorney now adopts this self-serving "excuse" of Greenwald, and argues that because respondent "adamantly professed his innocence" he could not have been prejudiced in the *Strickland* sense. The Second Circuit had little difficulty in dismissing this argument. The court below determined that Greenwald himself believed that the option of proceeding to trial was "suicidal". The Second Circuit also determined that Greenwald understood (and acknowledged) that it was "very possible" for clients to change their minds "for

whatever reason". Thus, the Second Circuit concluded that it was starkly prejudicial that Greenwald totally failed to offer respondent *any* advice in these circumstances.[10]

The problem with the District Attorney's prejudice argument is twofold. First, it fails logically because there cannot be a legitimate claim that respondent was "adamant" about not pleading guilty unless he refused to so plead in the face of advice to the contrary. Since Greenwald gave respondent no advice to accept the 1-3 plea offer, the District Attorney cannot argue that respondent was "adamant"—unyielding—about rejecting it.

Secondly, the District Attorney's lack-of-prejudice argument fails factually because, as noted above, even Greenwald acknowledged that he wasn't certain whether respondent—a man with no prior experience with the criminal justice system—would have changed his mind. Indeed, Greenwald's eleventh-hour manuevering to get the plea offer is a glaring indication that Greenwald believed that respondent would not have been deaf to advice to take the plea offer.

The District Attorney in essence is arguing that the Sixth Amendment requires nothing more from a criminal defense

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[10]The Sixth Circuit Court of Appeals in *Turner v Tennessee,* 858 F.2d 1201 (6th Cir. 1988), made it clear that the profession of innocence by a client does not excuse the failure to give that client advice as to whether to accept or reject a plea bargain. In the *Turner* case, the defendant insisted upon his innocence, both publicly and privately. Nevertheless, it was held that a defense attorney has a duty to analyze the evidence with his client, and to *confront* him with that evidence if necessary, to make sure that the defendant understands the import of his decision to reject the plea offer.

attorney than that he act as a plea messenger for the prosecution. The District Attorney is contending that this Court did not mean what it stated in *Von Moltke*, and that a defense attorney does *not* have a duty to "offer his informed opinion as to what plea should be entered." It is reprehensible for a District Attorney—a public official entrusted to protect the rights of the accused—to be making this argument.

Counsel's duty to advise his client in the course of criminal proceedings is *fundamental*. An attorney may not simply sit back and watch his client make a decision that he, the attorney, has ample reason to believe will destroy his client's life. If the lawyer is not there to counsel his client on whether to accept or reject a plea offer, it is difficult to justify his being there at all.

POINT 2

Trial Counsel's uncontroverted repeated admissions that he did not advise respondent as to whether to accept the proffered plea bargain under the circumstances of this case constituted a sufficient record upon which the Second Circuit based its decision

The District Attorney claims that the Second Circuit based its decision upon an "inadequate record". Petition, p 27. To support this claim, the District Attorney—again—intentionally misleads this Court by stating: "Clearly, the state court had never been asked to address the issue of whether Greenwald should have recommended acceptance of the People's plea offer." Petition, p 27.

The *first point* in Respondent's post-hearing memorandum to the state trial court, the *first point* in Respondent's brief to the state intermediate appellate court, and the *first point* in Respon-

dent's application for leave to appeal to the New York Court of Appeals was the *very issue* upon which the Second Circuit has granted relief. (The pertinent pages of these documents are annexed hereto as Appendix 3) Contrary to the District Attorney's false representation to this Court on p 5 of its Petition (as well as on p 27), the state trial court and the state appellate courts were clearly and completely "focused" on this issue. As can be seen in Appendix 3, the state trial and appellate courts were provided with the authority that was relied upon by the Second Circuit in the decision below. Sadly, there is no other way to say it: the District Attorney has decided to mislead this Court in his effort to put respondent back in prison.

There is no need whatever for "clarification", as the District Attorney disingenously puts it on p 28 of the Petition. As the Second Circuit found—without possible dispute:

> Greenwald testified at great length at the hearing . . . time and again, and in many forms, Greenwald made clear that he had not in any way or at any time discussed with the [respondent] the advisability of accepting or rejecting the plea offer . . . His testimony made clear that, although he never even suggested such a thought to [respondent], it was his own view that his client's decision to reject the plea bargain was suicidal.

Petitioner's App 4 and 5.

The state and federal courts below had these facts, together with respondent's various briefs presenting this issue as the *primary* argument. The record below was obviously adequate, and the District Attorney's argument is devoid of merit.

POINT 3

The District Attorney waived its *Teague v Lane* argument by failing to present it to the District Court or to the Second Circuit until a motion for reargument

Again, the very issue upon which the Second Circuit decided this case was presented by respondent as the *primary* issue to every court, state and federal, that heard this case.

The District Attorney never argued—until his motion for reargument to the Second Circuit—that the rule briefed by Respondent to each and every state court and the District Court and the Second Circuit was in fact a "new rule" within the meaning of *Teague v Lane*, 489 U.S. 288 (1989) This argument, therefore, is waived. *Collins v Youngblood*, 497 U.S. 37, 41 (1990) (*Teague* defense not jurisdictional; State waives it by failing to plead it)

POINT 4

The Second Circuit did not announce a new rule within the meaning of *Teague v Lane*

Even assuming that this argument is not waived, it is not substantively meritorious.

The Second Circuit observed that *Strickland v Washington*, 466 U.S. 668 (1984) indicated that American Bar Association standards are guidelines to be utilized in determining what constitutes ineffective assistance of counsel. Petition App 8. The court below further observed that ABA Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992) states:

> A defense lawyer in a criminal case has the duty to advise his client fully on *whether a particular plea to a charge appears to be desirable.*

Petition App 8. The Second Circuit cogently noted that this duty is so well understood by criminal defense attorneys that the issue is one that did not need litigation to be clarified. Petition App 8.

The District Attorney now argues that this duty of a criminal defense attorney has never been established by the Supreme Court and that the language to the contrary in *Von Moltke v Gillies,* 332 U.S.708, 721 was only *dicta.* In *Von Moltke,* a *habeas* petitioner asserted that her entry of a plea of guilty was invalid because she had not been afforded the assistance of counsel. This Court squarely held:

> Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.

Von Moltke, 332 U.S. at 721. This is precisely what Greenwald did *not* do at bar, and this is precisely why the state court judgment at bar is contrary to and an unreasonable application of the decision in *Von Moltke.* It bears noting that Respondent argued to the state trial and appellate courts that *Von Moltke* controlled the outcome of this case. The state courts, then, simply refused to apply the above holding of *Von Moltke.*

Moreover, this Court has not diluted the duty established in *Von Moltke* in any way since that decision, and has quite obviously often assumed its existence. *Cf. Holloway v Arkansas,* 435 U.S. 475 (1978); *Burger v Kemp,* 483 US 776, 785-787

(1987) In *Hill v Lockhart,* 474 U.S. 52, 56 (1985), this Court held that the voluntariness of a plea "depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " (*quoting McMann v Richardson,* 397 U.S. 759, 771 (1970)) This Court further stated, "Our concern in McMann v Richardson with the quality of counsel's performance in advising a defendant whether to plead guilty stemmed from the more general principle that all 'defendants facing felony charges are entitled to the effective assistance of competent counsel.' " *Hill,* 474 U.S. at 57, *quoting McMann,* 397 U.S. at 771 and n 14.

This Court's *Teague* jurisprudence makes clear that Greenwald's ineffectiveness at bar is subsumed by *Von Moltke* and later cases. *See, e.g., Wright v West,* 120 L.Ed.2d 225, 249-250 (1992) (Kennedy concurring) ("Where the beginning point is a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one *not dictated by precedent.*") (emphasis added); *Wright,* 120 L.Ed.2d at 253 (Souter, concurring) (the new rule doctrine "does not mean, of course, that a habeas petitioner must be able to point to an old case decided on facts identical to the facts of his own. But it does mean that, in light of authority extant when his conviction became final, its unlawfulness must be apparent."); *Wright,* 120 L.Ed.2d at 247 (O'Connor, concurring) ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with

which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.")[11]

Contrary to the District Attorney's present argument (which miscasts the Second Circuit's holding as creating new obligations on the part of criminal defense attorneys), the decision below clearly did not announce some sort of new rule never before enunciated by the Supreme Court. The above cases make clear that the Supreme Court (and lower federal and state courts) has (have) always demanded that accused felons be given informed advice as to whether a guilty plea should be entered. The fact that Greenwald managed to violate this cardinal principle in an unusually brazen manner—he admitted (indeed, *insisted*) that he gave no advice at all—does not render *habeas* relief thereon a "new rule" in any sense of that term.

POINT 5

The "Antiterrorism and Effective Death Penalty Act of 1996" does not apply retroactively to habeas corpus petitions not involving death sentences filed prior to the statute's enactment

Respondent filed this petition for a writ of *habeas corpus* in the District Court on March 16, 1995. The District Court issued its decision denying the writ on October 6, 1995. Respondent appealed that decision to the Second Circuit, and the decision of the court below was issued on May 3, 1996.

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[11]The lower federal and state court cases presented in this Brief further underscore the point that the Second Circuit's holding is not a new rule.

On April 24, 1996, President Clinton signed into law the "Antiterrorism and Effective Death Penalty Act of 1996", P.L. 104-132. The Act is divided into 9 titles, but only Title I is of relevance here.

Title I is entitled "Habeas Corpus Reform" and consists of 8 sections. Sections 101, 102 and 103 are not relevant here.

Section 104 of the Act bars the federal courts from granting *habeas* relief from a claim unless the adjudication of the claim in the state courts:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 105 is not relevant herein, and Section 106, which applies to second or successive *habeas* applications, is not relevant here. Section 107 involves death penalty litigation procedures and is not directly relevant here. Section 108 involves amendments to federal narcotics laws and is not relevant here.

The District Attorney is contending that this Act should be applied retroactively to respondent's *habeas* petition. The Second Circuit correctly held that the Act should not be applied retroactively to this case.

This Court has recently held that "retroactivity is not favored in the law". *Landgraf v USI Film Products,* 114 S.Ct. 1483,

1496 (1994) This Court held that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine older than our republic." *Landgraf,* 114 S.Ct. at 1497.

Landgraf mandates that the first step in any retroactivity analysis is to determine whether Congress has prescribed a statute's proper reach. 114 S.Ct. at 1505.

In adopting the Act in question here, Congress clearly considered the question of its application to cases filed prior to the Act's effective date. Consistent with its overall scheme, Congress provided very different answers to the retroactivity question in the general provisions in Sections 101-106 than in the more restrictive provisions that apply pursuant to Section 107 as a *quid pro quo* to states providing capital prisoners with adequate funding for competent state post-conviction counsel and certain other procedural advantages.

Of particular significance is the provision setting forth the effective date of the Section 107 procedures. It states that the special *habeas corpus* procedures in capital cases "shall apply to cases pending on or after the date of enactment of this Act." There is, however, *no similar provision* regarding the effective date of the *habeas corpus* changes in Sections 101-106—the sections that control the case at bar. The express inclusion of the effective date language in Section 107, and the omission of comparable language for the other amendments, evidences a clear congressional intent that only the more restrictive procedures in Section 107 were to apply to pending cases, as a *quid pro quo* for various procedural advantages previously afforded petitioners subject thereto. By contrast, Congress did not intend for the new procedures in Sections 101-106 to apply to cases in which the federal courts' jurisdiction has been invoked prior to

the effective date of the Act by petitioners who were not previously given those procedural advantages. *See Russello v United States,* 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute, but omits it in another section of same Act, it is generally assumed that Congress acts intentionally in the disparate inclusion or exclusion").

The Second Circuit correctly held that due to the clear expression of congressional intent arising from the structure and language of Title I, this case must be adjudicated pursuant to the law in effect at the time Respondent invoked the jurisdiction of the District Court.[12]

POINT 6

The District Attorney has waived the argument that the new Act applies to this case

Even assuming that this Court determines that the Act applies retroactively to cases already decided by a district court, it is respectfully contended that it should not be applied at bar. The relevant provisions of the Act somewhat codify *Teague v Lane*, 489 U.S. 288 (1989) (The Act requires more procedural deference to state court judgments than did the *Teague* doctrine because analysis is confined to clearly established federal law *as determined by the Supreme Court*—presumably this is based upon the view that state courts are only bound by Supreme Court precedent and that therefore state court judgments could not be overturned by *habeas* courts applying federal law as established by district or circuit courts). But, as argued previ-

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[12]*Accord, see Edens v Hannigan,* 87 F.3d 1109 (CA10 1996); *but see, Lindh v Murphy,* 96 F.3d 856 (CA7 1996)

ously in this Brief, the District Attorney did not raise a *Teague* argument before state courts, before the District Court or even before the Second Circuit (until his motion for reargument).

The Act was enacted prior to the decision of the Second Circuit. Certainly a petition for rehearing to a circuit court of appeals is not the appropriate time in a *habeas* case to first raise a "new rule" issue or to raise an issue based upon a statute enacted *prior* to the panel decision of the circuit court.

Section 104 of the Act is similar in structure and application to pre-existing limitations on *habeas corpus* adjudication such as exhaustion, procedural default, harmless error, successive petitions, and the new rule doctrine of *Teague v Lane*. None of these limitations are jurisdictional, and all give the State the burden of invoking the limitation and proving its applicability to a particular case. *See, e.g., O'Neal v McAninch,* 115 S.Ct. 992, 994 (1995) (harmless error); *McClesky v Zant,* 111 S.Ct. 1454, 1470 (1991) (abuse of writ); *Collins v Youngblood,* 497 U.S. 37, 41 (1990) (*Teague* defense *not jurisdictional*; State waives it by failing to plead it); *Granberry v Greer,* 481 U.S. 129, 132 (1986) (nonexhaustion doctrine); *Estelle v Smith,* 451 U.S. 454, 468 n 12 (1981) (State waived procedural default defense by failing to invoke it)

The fact that the Act's restrictions are statutory—as opposed to judicially crafted—is of no moment. For example, the exhaustion of state remedies is statutorily mandated. *See* 28 USCS 2254 (b). "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *shall not be granted* unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process

ineffective to protect the rights of the prisoner.") (emphasis added). Yet, *Granberry v Greer* makes clear that exhaustion of state remedies is waivable.

Nothing in the new Act expresses any intent to limit jurisdiction of the federal courts. Therefore, Section 104 should come into play only if it is timely invoked by the State. *See Collins, supra*; *Goeke v Branch,* 131 L.Ed.2d 152 (1995)

POINT 7

The Second Circuit's decision was based upon clearly established law as determined by the Supreme Court that the Sixth Amendment requires counsel's informed opinion as to whether a plea bargain should be accepted or rejected is not a new rule within the meaning of *Teague v Lane*

Even assuming this Court determines that the Act is retroactive to this case and that the argument has not been waived, Petitioner contends that the panel decision was based upon clearly established precedent as determined by this Court. This argument has been already been made in this Brief in the context of *Teague v Lane*. But because the new Act somewhat changes the analysis,[13] this further comment is necessary: the arguments made in Point 4 of this Brief apply herein, *minus* any argument based upon decisions of lower federal and state courts.

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[13]Again, the Act requires more procedural deference to state court judgments than did the *Teague* doctrine because analysis is confined to clearly established federal law *as determined by the Supreme Court*—presumably this is based upon the view that state courts are only bound by Supreme Court precedent and that therefore state court judgments could not be overturned by *habeas* courts applying federal law as established by district or circuit courts.

Put into the context of the new Act, Respondent contends that the state court judgment herein was an unreasonable application of Supreme Court precedent for the reasons articulated in Point 4 of this Brief.

It should be noted that Senator Orrin Hatch, who drafted the subject Section 104 provisions, stated during the congressional debates on the Act:

> Moreover, the review standard proposed allows the Federal courts to review State court decisions that *improperly apply* clearly established Federal law. In other words, if the State court *unreasonably applied* Federal laws, its determination is subject to review by the Federal courts.

142 Cong. Rec. S3446 (April 17, 1996) (emphasis added)

This Court's *Teague* jurisprudence (which certainly will be relevant in analyzing the consequences of Section 104 of the Act) makes clear that Greenwald's ineffectiveness at bar is subsumed by *Von Moltke* and later cases.[14]

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[14]Again, *see* authorities cited on p 19 of this Brief.

CONCLUSION

This Court should deny certiorari.

Dated: Middletown, New York
November 13, 1996

Respectfully submitted by:

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APPENDIX 1—Errata of the Second Circuit duly filed May 21 and July 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1332—August Term, 1995
(Argued March 29, 1996 Decided May 3, 1996)
Docket No. 95-2688

OSCAR BORIA,

Petitioner-Appellant,

-v-

JOHN KEANE, Superintendent,
Sing Sing Correctional Facility,

Respondent-Appellee.

ERRATA

Page	Line	Delete	Insert
3664	21-22	discusses the question in more detail	observed
3664	31-38	:and often counsel can protect the client from disaster only by using a	....

considerable amount of
persuasion to convince
the client that a plea
which the client instinctively
disfavors is, in
fact, in his or her best
interest. This persuasion
is most often needed to
convince the client that
s/he should plead guilty
in a case in which a not
guilty plea would be
destructive

Distribution:

x Panel Members
x West Publishing Co.
x Clerk

So Ordered:

s/illegible
U.S. Circuit Judge

illegible
Date

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1332—August Term, 1995

Petition for Rehearing
Submitted: May 17, 1996

Decided July 17, 1996

Docket No. 95-2688

OSCAR BORIA,

Petitioner-Appellant,

-v-

JOHN KEANE, Superintendent, Sing Sing Correctional Facility,

Respondent-Appellee.

Before:

OAKES and PARKER, Circuit Judges,
and KNAPP, District Judge.*

---

* Honorable Whitman Knapp of the United States District Court for the Southern District of New York, sitting by designation.

ERRATA

Page	Line	Delete	Insert
3670(b)	3 thru 5	does not apply retroactively to habeas corpus petitions not involving death sentences filed prior to the statute's enactment.	does not apply to this case.

Distribution:

xx Panel Members
xx West Publishing Co.
xx Clerk

So Ordered:
s/illegible
U.S. Circuit Judge

7/31/96
Date

ERRATA ON OPINIONS 1995 TERM

Page 3373. line 29—delete "time barred" and insert "time-barred" in place thereof.

Page 3418. line 19—delete "This motion" and insert "This cross-motion" in place thereof.

Page 3418. lines 23-24—delete "not previously to have arisen." and insert "not to have previously arisen." in place thereof.

Page 3419. line 4—delete "deny the motion" and insert "deny the cross-motion" in place thereof.

Page 3422. line 24—delete "Axel Johnson," and insert "*Axel Johnson*," in place thereof.

Page 3426. line 24—delete "exempt any such" and insert "exempt those" in place thereof.

Page 3426. Fn. 3, line 5—delete "(7th Cir. 1990" and insert "(7th Cir. 1990)" in place thereof.

Page 3426. Fn. 3, line 7—delete "(9th Cir. 1991)" and insert "(11th Cir. 1991)" in place thereof.

Page 3426. Fn. 3, line 9—delete "judgment)." and insert "judgment), *cert. denied*. 502 U.S. 1049 (1992)," in place thereof.

Page 3476. line 5—delete "Garden City, NY *for*" and insert "Garden City, NY, *for*" in place thereof.

Page 3476. line 9—delete "brief) *for*" and" and insert "brief, *for*" in place thereof.

Page 3494. line 6—delete "a new" and insert "her" in place thereof.

Page 3494. line 7—delete "in the district court".

Page 3500. line 29—delete comma after "better".

Page 3503. line 6—delete comma after "Chicago".

Page 3505. line 1—delete "hich" and insert "which" in place thereof.

Page 3505. line 7—insert comma after "Brawer".

Page 3529. line 18—delete "LUMBARD, and" and insert "LUMBARD and" in place thereof.

Page 3530. line 16—delete "civil cases and" and insert "civil cases, and" in place thereof.

Page 3531. line 29—insert "other suit" after "other, unrelated suit" in place thereof.

Page 3534. line 8—insert "a broad discretion," after "broad discretion."

Page 3659. Fn. 1 ln 1—delete "As any trier of fact would have a tendency to discount (or even reject) the testimony of a defendant," and insert "As the state court finders of fact may have rejected parts or even all of petitioner's testimony." in place thereof.

Page 3660. lines 29-30—insert "[see footnote 3]".

Page 3665. line 2—delete "supplied by us" and insert "ours" in place thereof.

Page 3666. Fn 6, ln 6—delete "4" and insert "3660" in place thereof.

Page 3669. line 10—delete "questions" and insert "conclusions" in place thereof.

APPENDIX 2—Corrected Opinion of the Second Circuit in Boria v. Keane dated October 25, 1996

CORRECTED OPINION
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1332 August Term, 1995
(Argued March 29, 1996 Decided May 3, 1996
Corrected by Errata duly filed May 21, and July 11, 1996 Refiled and reissued to incorporate said corrections, October 25, 1996 †)

Docket No. 95-2688

OSCAR BORIA,

Petitioner-Appellant,

v.

JOHN KEANE, Superintendent, Sing Sing Correctional Facility,

Respondent-Appellee

Before: OAKES and PARKER, Circuit Judges,
and KNAPP, Senior District Judge*

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*Honorable Whitman Knapp of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from order entered in the United States District Court for the Southern District of New York (Conner, J.) denying a petition for a writ of habeas corpus.

Vacated and remanded.

Robert N. Isseks, Middletown, NY for petitioner-appellant

Francis D. Phillips, II, Goshen, NY for respondent-appellee.

+This Corrected Opinion is issued solely for the purpose of incorporating into the text the errata duly filed May 21, and July 11, 1996.

WHITMAN KNAPP, Senior District Judge

The petitioner is now—and for about six years has been—serving a twenty year to life sentence resulting from a "buy and bust" arrest for having sold four plastic bags of cocaine to an informer. This was petitioner's first contact with the criminal law. Upon this appeal, he does not challenge the propriety of the trial leading to his conviction. Rather, he asserts that he was deprived of constitutionally adequate representation by counsel when the People offered him a plea bargain which would have resulted in a one to three year sentence, and his attorney allowed him to reject such offer without giving him any advice as to the wisdom of so doing.

This argument was first presented to and rejected by the judge who had presided over the trial. The trial judge's rejection was affirmed by the Appellate Division of the New York Supreme Court, and leave to appeal to the Court of Appeals was denied. Petitioner renewed the claim in the instant Habeas Corpus proceeding, where it was rejected by the District Court in a carefully considered opinion. This appeal followed.

BACKGROUND[1]

Petitioner was arrested on May 13, 1988, and eleven days later was indicted for a Class A-II felony. Upon arraignment, being represented by one Thomas Murphy, Esq., he pleaded not guilty. On June 10, petitioner's father retained Gary Greenwald, Esq. to represent his son, making an "up front" payment of $8,000.[2] Some time between July 25 and August 10, the District Attorney advised Greenwald that the People were willing to accept a plea of guilty under circumstances which would result in a sentence of 1 to 3 years; but warned that should such offer be rejected, there would be filed a superseding indictment for a Class A-I felony which, pursuant to the "Rockefeller Laws," would make that or any similar plea impossible.

On August 10, Greenwald advised the court that the petitioner rejected the offer. The District Attorney then put on the record the warning he had previously given Greenwald about the consequences of rejection; and on the following day sent Greenwald a formal notice that the matter was to be presented to a Grand Jury. The threatened indictment was not returned until September 20, 1988. Petitioner was ultimately convicted, and on January 4, 1990, began to serve his sentence.

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[1]As the state court finders of fact may have rejected parts or even all of petitioner's testimony, this statement will be based exclusively on matters of record and the testimony of the attorney claimed to have rendered constitutionally ineffective representation.

[2]The formal retainer agreement executed by petitioner on or about June 10 provided: "I ... do hereby agree to retain the law office of Greenwald, Graubard & Cohen on the matter pending before Goshen County Court. The legal fees exclusive of hearings and trials shall be a minimum of $10,000 and a maximum of $20,000. The retainer does not apply to any form of appeals." (H. 36-37).

In 1992, petitioner, represented by a different attorney, moved the trial judge for an order vacating the judgment of conviction on the ground, among others, of constitutionally inadequate representation by counsel. A hearing on such motion, among others, began on February 26 and concluded on March 6.

Greenwald testified at great length at the hearing. He testified that he did not recall any conservation with the District Attorney or anyone in the District Attorney's office regarding the case before August 10. Nothing in his testimony suggests that he had any contact with the District Attorney's office between August 10 and September 20. Indeed, he testified that he could not recall with certainty the name of any assistant district attorney with whom he might at any time have spoken regarding this case. He had at all times exclusively relied on the petitioner for any and all information about the case.

Just before the trial began, Greenwald sought a ruling suppressing two ruinous statements petitioner had made after his arrest. He told the trial judge:

> had the attorney for the Defendant been aware of the existence of and the prosecutor's intent to use those statements for any purpose whatsoever, during the course of trial then his advise to the Defendant, relative to accepting or to rejecting the proffered offer of a plea to a B felony, may well have been different.

Greenwald Affirmation, 9/25/89.[3]

However, time and again, and in many forms, Greenwald made clear that he had not in any way or at any time discussed with the petitioner the advisability of accepting or rejecting the offered plea. He testified that, after advising petitioner that a rejection of the plea would be final in the sense that the expected superseding indictment would eliminate all possibility of a minimal sentence, he kept discussing with petitioner strategies he planned to follow in defending against the new indictment.

His testimony made clear that, although he never even suggested such a thought to petitioner, it was his own view that his client's decision to reject the plea bargain was suicidal.[4] He

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[3]New York Criminal Procedure Law provides that upon demand of a defendant, the prosecutor has a duty to disclose "any written, recorded or oral statement of the defendant . . . made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him." N.Y. Crim. Proc. Law §240.20(1) (a) (McKinney 1993). Greenwald swore in his affidavit of September 25, 1989, offered in support of his motion to suppress the statements, that "the prosecutor had . . . [falsely] informed the Defendant and this Court, that no such statements existed."

[4]For example, at the hearing, Greenwald testified: "on June 10th, 1988 [the day Greenwald was retained], it would have been my position and my belief that relative to criminal cases that a drug case under circumstances of a possession or direct sale to an undercover agent is probably one of the most difficult cases to defend and, secondly, sir, in relationship to the hate, which I often tell drug defendants, that most people who sit on the jury have never seen drugs before such as cocaine . . . and [the jurors] generally are very prejudicial because peoples' views are very anti-drugs and, therefore, it is difficult and it's often difficult to get an unbiased jury in that regard." H. at

(continued...)

sought to justify his conduct by asserting that he was certain that the petitioner would never admit his guilt or accept a plea. He said he had been confirmed in this certainty by the petitioner's repeated assertion that accepting a plea would embarrass him in front of his children. For example, Greenwald testified: "He would be very upset about the plea. He was upset about how he was embarrassed in front of his children. And he would bring up the subject in a context often about his upset about his children." (H. at 18).

Greenwald admitted that he had been aware that his client—like any other person—was capable of changing his mind.[5] Yet he did nothing to persuade either his client or the father by whom he had been retained of the absurdity of a decision to risk years of prison separation from his family to avoid a few hours of embarrassment "in front of his children."

DISCUSSION

Several questions are presented by the foregoing facts:

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[4](...continued)
44 (emphasis supplied). He also testified that he had told the judge at sentencing that the court could "take judicial notice" that getting an acquittal in a drug case in upstate New York was almost impossible. Id.

[5]Greenwald's testimony in this regard was:
Q (by petitioner's counsel) Mr. Greenwald, you knew from Day One, as you tell us, that he wasn't going to plead to anything; correct?
A To answer your question, sir, what I knew from the beginning and having practiced criminal law for substantial years, often a client changes his position in regard to a matter, and though he did express what I have said, it is very possible at any given time he would change his mind for whatever reason. So the answer to your question is I did not know definitely.

1. Under Strickland v. Washington 466 U.S. 668, 104 S.Ct. 2052, 90 L.Ed.2d 674 (1984) (hereinafter "Strickland"), do the facts establish that Greenwald's conduct did indeed fall short of constitutionally required assistance?

2. Also under Strickland, can it be said that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"?

3. What is the impact upon this case of Strickland's "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance?"

4. Are we precluded from considering these questions by any factual finding that may have been made by a New York State court?

We shall consider each of these questions in turn.

First, to show Strickland ineffectiveness it must appear that, under the totality of circumstances, Greenwald failed to exercise the skills and diligence that a reasonably competent attorney would provide under similar circumstances. 466 U.S. at 688. There seems to be no Second Circuit decision dealing with the precise question of a criminal defense lawyer's duty when a defendant's best interests clearly require that a proffered plea bargain be accepted, but the defendant, professing innocence, refuses to consider the matter. This lack of specific decision undoubtedly arises from the circumstance that such duty is so well understood by lawyers practicing in this Circuit that the question has never been litigated.

While the Second Circuit may not have spoken, the Strickland Court has indicated how the question should be resolved. Just before starting its discussion of the merits, it observed that it had "granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." 466 U.S. at 684. Later it pointed to "[p]revailing norms of practice as reflected in American Bar

Association standards" as guides "to determining what is reasonable." Id. at 688.

The American Bar Association's standard on the precise question before us is simply stated in its Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992):

> A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable. (emphasis added)

Anthony G. Amsterdam, in Trial Manual 5 for the Defense of Criminal Cases (1988), observed:

> The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will. [citation omitted] But counsel may and must give the client the benefit of counsel's professional advice on this crucial decision. § 201 at 339 (the word "must" was emphasized by the author; otherwise, the emphasis is ours)

This manual is a joint project of the American College of Trial Lawyers, the National Defender Project of the National Legal Aid and Defender Association, and the ALI-ABA Committee on Continuing Professional Education. The Reporter, Anthony G. Amsterdam, is a distinguished Professor of Law and Director of Clinical Programs and Trial Advocacy at New York University School of Law.

And finally, in United States v. Villar 416 F.Supp. 887, 889 (S.D.N.Y. 1976), Judge Motley—in circumstances quite

different from those at bar—made the following observation about effective assistance of counsel:

> Effective assistance of counsel includes counsel's informed opinion as to what pleas should be entered. Walker v. Caldwell, 476 F.2d 213, 224 (5th Cir., 1973); Jones v. Cunningham, 313 F.2d 347 (4th Cir. 1963), cert denied 375 U.S. 882, 84 S. Ct. 42, 11 L.Ed.2d 63 (1965). As Chief Judge Sobeloff stated in the latter case (at 353):
>
> > Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist. Such a duty is imposed for the salutary reason that 'prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.' Van Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948). (emphasis Judge Motley's)

Turning to the facts before us, it would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice.

The second Strickland question need not long detain us. Had Greenwald—as he "often [told] drug defendants"—advised his two new clients (petitioner's father, who procured and paid him and petitioner, who signed the retainer agreement) of his professional judgment that it was almost impossible for a "buy and bust" defendant to obtain an acquittal in Orange County (see footnote 4, supra), there would have been more than a "reasonable probability" that the father would have organized the family to persuade petitioner not to pursue the suicidal course he

seemed bent upon following. Indeed, had Greenwald taken the trouble to learn of the ruinous statements petitioner had made after his arrest,[6] the probability of persuading him to accept the plea bargain would have matured from a "reasonable probability" to a very strong likelihood.

With respect to the Strickland "strong presumption," the District Judge in explaining his order under appeal gave it serious consideration. He emphasized Greenwald's testimony that he "had frequently discussed the plea offer with [petitioner] during the summer of 1988." This emphasis suggests that the District Judge considered the "strong presumption" as requiring a finding that Greenwald—in the course of these frequent discussions—must have, by implication at least, conveyed to his client his own belief that rejecting the offered plea bargain would be suicidal. However, Greenwald's unequivocal testimony prohibits such a finding. Such testimony did not give much indication of what occurred during these frequent discussions except that Greenwald seems to have kept explaining his planned strategies for winning an acquittal. However, it established beyond peradventure that Greenwald never gave his client any advice or suggestion as to how to deal with the People's offered plea bargain.

More importantly, the Strickland Court did not intend its "strong presumption" to apply to a case such as this. It made clear that the purpose of the presumption was to protect lawyers from having strategic decisions judged with "the distorting

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[6] As noted in footnote 3, supra, Greenwald's affidavit in support of his motion to suppress these statements asserts that he had made appropriate demand on the District Attorney but that the latter had deceitfully denied the existence of any such statements. We find—especially in light of Greenwald's testimony about his contacts with the District Attorney's office (see [p. 4] supra)—that such assertion is sufficiently improbable to warrant rejection as a matter of law. We do so reject it.

effects of hindsight." 466 U.S. at 689.[7] Greenwald was confronted with no strategic decision as to whether or not to give advice to his client. Had there been a reasonable chance of acquittal, petitioner might have been confronted with the strategic decision of whether or not to accept the plea bargain. In no event could Greenwald have been relieved of his constitutional duty to give his "professional advice on this crucial decision."

The fourth question, whether relief is precluded by any state court finding of fact, requires consideration of several circumstances heretofore irrelevant to this opinion.

No state court ever gave solo consideration to the narrow question addressed in this opinion. On the contrary, the above noted hearing before the trial court, which began on February 26 and concluded on March 6, dealt with an "omnibus" motion presenting an apparently wide variety of claims. Petitioner himself testified, claiming—in a manner typical of distraught defendants—all manner of real and imagined grievances. Among other things, he claimed that he had not been informed of the offered plea bargain until after the superseding indictment had been returned. That claim could be—and was—easily refuted by testimony of several witnesses whose credibility could not be questioned. The District Attorney, apparently treating the omnibus motion as a unit, made an attack on petitioner's credibility, focusing on this particular falsehood. The question of petitioner's reliability might well have been vital to many—if not most—of the questions presented by the

---

[7] The Strickland Court was dealing with a capital case in which it was contended that the defendant's lawyer should have—in the sentencing phase of the case—provided the trial judge with concededly helpful character-type evidence. The lawyer's strategic reason for withholding such evidence was fear that—in light of expected cross-examination and rebuttal—it would do more harm than good.

omnibus motion. However, it has no bearing on the narrow question with which we are now concerned. See Footnote 1, supra.

When it came to decision, the trial judge was primarily concerned with a question of no present relevance, namely whether petitioner's statement as to the timing of his knowledge of the possibility of a plea bargain was truthful or false. His opinion does not mention petitioner's constitutional right to be advised whether or not the offered bargain "appear[ed] to be desirable." Similarly, the Appellate Division's affirming opinion addressed a host of issues not here relevant. Its sole finding of fact concerning the claimed inadequacy of counsel was that "[the petitioner] was made aware of a plea offer of 1 to 3 years imprisonment, and told his trial counsel to reject it." People v. Boria 612 N.Y.S.2d 80, 81, 204 A.D.2d 652 (2d. Dept. 1994).[8]

Turning to the question of whether we are precluded, we are faced with an Appellate Division finding of fact which has no present relevance, coupled with a conclusion of law that petitioner had been adequately represented by counsel. The District Attorney notes in his brief, at p. 8 citing Strickland, 466 U.S. at 698 and Winkler v. Keane 7 F.3d 304, 308 (2d. Cir. 1993), cert, denied, 114 S.Ct. 1407 (1994), that conclusions of law require de novo review. As we have seen, such review can lead to only one conclusion.

This leaves the question of what remedy should result from our ruling. In denying petitioner's motion to vacate the judgment, the trial judge suggested that the remedy petitioner sought, namely to be put back in a position of being able to plead to the

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[8] Leave to appeal to the Court of Appeals was denied by Honorable George Bundy Smith. 83 N.Y.2d 1002, 640 N.E.2d 151, 616 N.Y.S.2d 483 (1994). The Court itself was in no way involved, leaving the Appellate Division as the highest New York court to have ruled on the matter before us. See N.Y. Crim. Proc. Law §460.20 (McKinney 1994).

lesser indictment, was procedurally impossible. Whether or not such relief would then have been possible, it would not now be appropriate. There could now be no assurance that witnesses necessary for prosecution would be available should a trial be required. Furthermore, there is no claim before us on this appeal that the trial was affected by constitutional (or indeed any) error. Accordingly, petitioner having already served six years in prison —at least twice as long as would have been possible had he accepted the offered plea bargain—we shall order that the sentence be reduced to time served and that the petitioner be discharged, but the judgment of conviction will not be disturbed.

CONCLUSION

For the above stated reasons, we vacate the order appealed from, and remand to the District Court for entry of an order granting the petition and directing that the petitioner be discharged.

APPENDIX 3—Portions of respondent's post-hearing memorandum (cover page, table of contents and pages 37-41)

COUNTY COURT : STATE OF NEW YORK
COUNTY OF ORANGE

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

INDICTMENT NO. 88-440

OSCAR BORIA,

Defendant.

----------x

POST-HEARING MEMORANDUM

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COUNTY COURT : STATE OF NEW YORK
COUNTY OF ORANGE

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

INDICTMENT NO. 88-440

OSCAR BORIA,

Defendant.

----------x

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(37) to us immediately so that we may see if this satisfies our lien in this matter."

(6) That the Gurda office never received any response to their November 2, 1989, letter to Greenwald. Greenwald ignored Gurda's request completely. Greenwald never advised Gurda of the settlement amount, never advised Gurda how the proceeds were disbursed, never advised Gurda how he, Greenwald, decided that he deserved twice the legal fee that the Gurda firm deserved, and never provided Gurda with an accounting.

Boria's counsel made this offer of proof not only to show this Court that Greenwald lacks integrity and that he is dishonest, but also to show how Greenwald conducts himself as though the Code of Professional Responsibility does not apply to him vis a vis his dealings with other lawyers and that there is therefore no reason to believe that he cares about the Code of Professional Responsibility in his dealings with his clients, and particularly Boria. This Court refused to accept this offer of proof.

ARGUMENT

POINT I

BORIA WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL BY GREENWALD'S FAILURE TO ACTUALLY AND SUBSTANTIALLY ASSIST BORIA IN DECIDING WHETHER TO ACCEPT THE 1-3 PLEA OFFER

Greenwald repeatedly insisted during his testimony that he gave Boria absolutely no advice with respect to the 1-3 plea offer. Greenwald and Neylon did testify, however, that Greenwald (38) expressed to Boria the opinion that the search and seizure was unlawful and that, although he could not predict the outcome with certainty, he, Greenwald, felt that Boria's chances at suppression were "excellent". If this testimony is to be

believed, the Court must find that Greenwald failed to provide Boria with the meaningful and objectively reasonable representation mandated by the state and federal constitutions.

Although the decision to plead guilty ultimately rests with the client, an attorney is obligated to assist in the decision making process. Trial counsel for an accused has the duty to give his client the benefit of his professional advice. Commonwealth v Napper, 385 A2d 521, 524 (S.C. Pa. 1978); Washington v James, 739 P.2d 1161.

An attorney's duty to advise his client with respect to plea bargaining is set forth in I Amsterdam, Segal, and Miller, Trial Manual for the Defense of Criminal Cases (1967):

> The decision whether to plead guilty or contest a criminal charge is probably the most important single decision in any criminal case. This decision must finally be left to the client's wishes; counsel cannot plead a man guilty, or not guilty, against his will. But counsel may and must give the client the benefit of his professional advice on this crucial decision, and often he can protect the client adequately only by using a considerable amount of persuasion to convince the client that one course or the other is in the client's best interest. Such persuasion is most often needed convince the client to plead guilty in a case where a not guilty plea would be totally destructive.

Napper, Supra at 524.

It has been held that trial counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial. *Walker v Caldwell*, 476 F.2d 213, 218 (5th Cir. 1973). When a (39) guilty plea is being entered counsel need only provide his client with an understanding of the law in relationship to the facts so

that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial. Id. When the decision is to go to trial, on the other hand, counsel has the added duty to make sure that his client fully understands and appreciates the degree of risk that is involved and the consequences that follow if the plea offer is rejected.

This duty to impart an understanding of a plea offer so that the accused may make an informed judgment has been outlined by the United States Supreme Court in Von Moltke v Gillies, 332 U.S. 708, 721 (1948). In that case the Supreme Court stated that "[t]o impart such an understanding to the accused, counsel *must*, after making an independent examination of the facts, circumstances, pleadings and laws involved, *offer his informed opinion as to what plea should be entered.*" (emphasis added). The record shows that Greenwald made no attempt to fulfill this duty to Boria. Indeed, Greenwald was emphatic that he never "offer[ed] his informed opinion as to what plea should be entered." Id.

Moreover, Greenwald admitted that he conducted no investigation into the facts of the case and simply relied upon what Boria told him before irrevocably rejecting the best plea offer Boria could get. In other words, Greenwald made no "independent examination of the facts." Von Moltke,. supra.

Greenwald testified, and the District Attorney has been arguing, as though the Sixth Amendment requires nothing more from (40) defense counsel than to act as a plea messenger for the prosecution. They want this Court to hold that a criminal defense attorney's duty to his client is fulfilled if all he does is inform his client of what the plea offer is and what sentence he can receive if it is rejected and he looses at trial.

The Fifth Circuit Court of Appeals has made it crystal clear that as far as the federal constitutional right to counsel is concerned, much more is required. Not only must the attorney inform the client of the plea offer, and not only must he offer his

opinion regarding the offer, he must "actually and substantially assist his client in deciding whether to plead guilty." Walker v Caldwell, 476 F.2d 213, 224 (5th Cir. 1973).

In addition to the federal and state case law cited above, the Code of Professional Responsibility and the American Bar Association standards support a duty to advise rule. The Code of Professional Responsibility, EC 7-7, states that "[a] defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable . . ." The pertinent part of the ABA standards suggests that "[a]fter informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome." ABA Standards Relating to the Administration of Criminal Justice, Standard 4-5.1 Advising (1982).

Outside of the authority cited above, all of which require an attorney to advise his client with respect to plea bargaining, (41) the law on this issue is sparse. This is not surprising, for it is *fundamental* that counsel advise his client in the course of criminal proceedings. An attorney may not simply sit back and watch his client make a decision that he, the attorney, has reason to believe will destroy his client's life. If the lawyer is not there to counsel his client on whether to accept or reject a plea offer, it is difficult to justify his being there at all, let alone his taking $8,000.00.[17]

In light of the enormous disparity between the District Attorney's original 1-3 plea offer and the 20 year to life sentence which Boria is currently serving, Greenwald's breach of his

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[17]Of Course, it is only the extraordinary case, such as the one at bar, that this issue would ever arise. Significantly, research has shown that there is currently no case which suggests that either the state or federal constitution does not impose a duty to advise.

ethical obligations and constitutional requirements are particularly intolerable.

POINT II

GREENWALD'S FAILURE TO RECOMMEND ACCEPTANCE OF THE 1-3 PLEA OFFER CONSTITUTED A DENIAL OF BORIA'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Boria asserts that in addition to Greenwald's failing to give any advice, he was denied effective assistance of counsel by Greenwald's failure to recommend that he accept the 1-3 plea offer. This is because Greenwald's failure to recommend acceptance of the 1-3 year offer was patently unreasonable to anyone familiar with the facts and circumstances of this case.

APPENDIX 3 (continued)—Brief to the Appellate Division, Second Department (cover page and table of contents)

SUPREME COURT : STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

- - - -

SUPREME COURT : STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

ORANGE COUNTY
INDICTMENT NO. 88-440

-against-

OSCAR BORIA,

Appellant.

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APPENDIX 3 (continued) - First Page of June 17, 1994, Letter Application to the Court of Appeals

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June 17, 1994

Honorable Judith S. Kaye
Chief Judge of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Attn: Honorable Donald M. Sheraw
Clerk

Re: *People of the State of New York vs. Oscar Boria*
Orange County Indictment No. 88-246

Dear Mr. Sheraw:

Please take notice that the defendant hereby makes application for a Certificate pursuant to Section 460.20(3-b) of the Criminal Procedure Law and Section 500.10 of the Rules of the Court of Appeals, that in the record and proceedings herein there are questions that ought to be reviewed by the Court of Appeals.

The defendant respectfully requests that the following questions put before the Appellate Division, Second Department, be reviewed:

Question One

Whether the State and Federal Constitutional rights to effective assistance of counsel require that a criminal defense attorney express to his client his opinion as to whether a plea offer should be accepted or rejected?